FILED.
NOV 1 1895
JAMES H. McKENNEY,
CLERK

No. 89.

IN THE SUPREME COURT

OF THE

UNITED STATES.

CHARLES H. GILDERSLEEVE,
Complainant and Appellant,
vs.
THE NEW MEXICO MINING COMPANY,
Defendant and Appellee.

Appeal from the Supreme Court of the Territory of New Mexico.

BRIEF FOR APPELLANT.

THOMAS SMITH,
H. L. WARREN,
Solicitors for Appellant.

NEW MEXICAN PRINTING CO., SANTA FE.

No. 89.

IN THE SUPREME COURT

OF THE

UNITED STATES.

CHARLES H. GILDERSLEEVE, *Complainant and Appellant,* *vs.* THE NEW MEXICO MINING COMPANY, *Defendant and Appellee.*	Appeal from the Supreme Court of the Territory of New Mexico.

BRIEF FOR APPELLANT.

I.

STATEMENT AS TO PLEADINGS AND RECORD.

In order to arrive at an understanding of the position of the appellant in this cause, and the manner in which he became a party thereto, brief reference must be made to numerous pleadings that have no direct bearing upon the merits of the questions at issue, and this duty we now proceed to perform in as brief a manner as we can to properly lay the matter before the Court. On the 29th of January, 1883, Edward T. Farish and others filed their bill of complaint in the District Court of Santa Fe county, Territory of New

Mexico, against the New Mexico Mining Company, the appellee here, and certain other persons. This bill is set out on pages 1 to 15 of the printed record.

On the 1st day of February, 1883, said complainants filed in the office of the clerk of said Court, as an exhibit to said bill, and which was referred to therein, a copy of letters patent, issued by the United States on May 20th, 1876, to the New Mexico Mining Company for the lands described in such bill of complaint, such copy of patent being set forth on pages 15 to 23 of the record.

By the said bill of complaint the said complainants claimed to own certain undivided interests in a certain tract of land situate in Santa Fe county, Territory of New Mexico, and which is particularly described in said bill and patent, which tract is commonly known and referred to as the "Ortiz Mine Grant," and surveyed and patented for 69,458.34 acres. On February 23, 1884, the New Mexico Mining Company, and other of the defendants, filed their answer to said bill of complaint, which answer is set forth on pages 23 to 37 of the record.

On June 26, 1884, Elias Brevoort, who was one of the defendants to the bill of complaint of Farish and others, filed his separate answer to such bill, in which answer said Brevoort set up that he was the sole owner of all the lands described in said bill, and letters patent, and that he became such owner by virtue of conveyances from the heirs of one Jose Francisco Ortiz, one of the original grantees of said lands from the Mexican government, the said Ortiz being the sole owner of such lands at his death. This answer is set out on pages 37 to 40 of the record.

On January 27th, 1886, a stipulation was filed in the office of the Clerk of said District Court, wherein in it was agreed by the solicitor of the said Edward T.

Farish and others, and the solicitors of said Elias Brevoort, that said Brevoort should have an order from said Court permitting him to file a cross-bill in the said cause instituted by said Farish and others, and that such order should be made *nunc pro tunc* as of July 11th, 1884, and on the same day the Judge of said Court, at chambers, in pursuance of such stipulation, made an order allowing said Brevoort to file a cross-bill in said cause, and that such order should be entered *nunc pro tunc* as of July 11th, 1884.

Such stipulation and order is set forth on page 41 of the record.

Thereupon the said Elias Brevoort filed in said cause his cross-bill as of date of July 11th, 1884, which cross-bill is set out on pages 41 to 56 of the record.

By this cross-bill the said Brevoort set up that he was the sole owner of all the lands described in the bill of complaint of Edward T. Farish and others, and in the letters patent filed therewith; that he became such owner by deeds of conveyance from the heirs of one Jose Francisco Ortíz, who was one of the original grantees of said lands from the Government of Mexico, and that said Ortiz had died intestate while being the sole owner of such lands. It was also set forth in such cross-bill that a petition had been presented by certain named persons to the Surveyor General of the Territory of New Mexico, in pursuance of the statutes of the United States, requesting such officer to examine into the title of such lands and make his report thereon to the Congress of the United States; that such officer made such examination and made his report in the matter, and that afterwards Congress acted upon such report and confirmed the title of such lands to the claimants and proper owners thereof; and that such lands had been surveyed and letters patent issued therefor by the United States to the said, The New Mexico Mining

Company, but that such letters patent were improperly and unlawfully issued to such New Mexico Mining Company, and that such Company held the legal title to such lands in trust for the said Brevoort, and he prayed that said New Mexico Mining Company, and other defendants to said cross-bill, might be decreed to hold such lands in trust for said Brevoort, and that they be compelled to convey the same to him.

On February 22d, 1886, the said New Mexico Mining Company filed its separate demurrer and answer to the said cross-bill of said Brevoort. This demurrer and answer is set out on pages 56 to 71 of the record. By this answer the said defendant claimed to be the sole owner of the lands described in said cross-bill and letters patent, by virtue of the act of confirmation by Congress, said letters patent, and divers conveyances described in such answer. The said defendant in said answer referred to a purported will alleged to have been executed by one Jose Francisco Ortiz and his wife, Maria Ynes Montoya, which purported will constituted one of the links in the chain of title of said defendant to said lands; and on February 27, 1886, said Brevoort filed in said cause his denial under oath of the due execution of said purported will, which denial is set forth on page 72 of the record. On July 2d, 1886, it was stipulated by the solicitors of the complainants and of the defendants in the said suit of Edward T. Farish and others, that this appellant, Charles H. Gildersleeve, should have leave to interpose and file an intervening petition in said cause, and that his rights as to the subject matter of such suit should be adjudicated and determined to the same extent as though he had been a party to such cause in the first instance; and on the same day the Judge of said District Court, in accordance with the terms of such stipulation, made an order directing that said Charles

H. Gildersleeve should have leave to file a petition of intervention in said cause, setting forth his claim and interest in said property, and that his rights in said property should be preserved, adjudicated and determined to the same effect and extent as though he had been made a party to said suit in the first instance. The said stipulation and order are set forth on pages 72 to 73 of the record.

On July 2d, 1886, said Gildersleeve, in pursuance of said order, filed in said cause his intervening petition, accompanied by certain exhibits, which petition and exhibits are set forth on pages 74 to 77 of the record.

By this intervening petition said Gildersleeve set forth that he was the owner of the undivided one-fourth part of the lands described in the said bill of complaint of said Edward T. Farish and others, the letters patent filed therewith, and the cross-bill of said Elias Brevoort; that he became such owner by virtue of a certain deed of conveyance executed by said Brevoort to said Gildersleeve and one John H. Knaebel; the said Brevoort having acquired title to all of said lands by deeds of conveyance from the heirs of Jose Francisco Ortiz, who died owning all of said lands.

On the 8th day of July, 1886, the said Charles H. Gildersleeve filed in said cause his petition with certain exhibits, in which he requested leave to become a party to the cross-bill that had been filed in said cause by Elias Brevoort as hereinbefore stated, and that he have leave to prosecute such cross-bill in his own name and for his own use and benefit, which petition and exhibits are set forth on pages 80 to 83 of the record.

On July 9th, 1886, the said New Mexico Mining Company filed in said cause a motion, supported by affidavit, by which motion the Court was requested to vacate the order made in said cause on July 2d, 1886, granting said Charles H. Gildersleeve the right to in-

terpose and file his petition of intervention in said cause, which motion and affidavit is set forth on pages 88 to 89 of the record.

On July 30th, 1886, the said motion was submitted to the Court and taken under advisement. Record, page 90.

On December 15th, 1886, the Judge of said District Court over-ruled the said motion to vacate the order made, allowing said Gildersleeve to interpose and file an intervening petition in said cause; and said Judge at the same time granted the motion and petition of said Gildersleeve wherein he requested leave to become a party to the cross-bill filed in said cause by said Elias Brevoort, and it was ordered that said Gildersleeve should become a party to such cross-bill, and he was given leave to make such amendments thereto as should be necessary to set forth and show the interest of said Gildersleeve in the property described in such cross-bill at the time the same was filed in this cause; and it was also ordered that a dismissal of said cross-bill by said Brevoort theretofore filed, should not be a dismissal of the same as to the interest of said Gildersleeve in the said property. These orders are set forth on pages 90 to 91 of the record.

On December 21st, 1886, the said Charles H. Gildersleeve filed in said cause his answer to the said bill of complaint of Edward T. Farish and others, which answer is set forth on pages 92 to 95 of the record.

On December 22d, 1886, said Gildersleeve, in pursuance of the leave granted him by the said order of December 15th, 1886, filed in said cause his amended cross-bill, which is set out on pages 96 to 111 of the record.

By this cross-bill, the said Gildersleeve, who is the appellant here, sets forth that the lands therein described, and which are the subject matter of this suit,

were granted by the Republic of Mexico to Jose Francisco Ortiz and Ignacio Cano, prior to the cession of the Territory of New Mexico to the United States; that said Ignacio Cano conveyed his interest in said lands to said Jose Francisco Ortiz; that said Ortiz died in the year 1848, intestate, and being the sole owner of said lands; that he left surviving him a widow, but left no direct heirs either descendant or ascendant; that he left as his only heirs at law a sister and the children of an only brother; that before the filing of the cross-bill in this cause by Elias Brevoort as hereinbefore stated, the said Brevoort acquired title to all of said lands from the heirs at law of said Jose Francisco Ortiz by means of deeds of conveyance from such heirs; that said Brevoort, while so owning such lands, conveyed an undivided one-half part thereof to the complainant (appellant here) and one John H. Knaebel, and that the said defendant, The New Mexico Mining Company, at the time it received any conveyance of such lands from said Brevoort, had actual knowledge of the title and interest held in such lands by said complainant. It is further set forth in said bill that in pursuance of the Act of Congress of July 22d, 1854, a petition was presented to the Surveyor General of the Territory of New Mexico for the purpose of having such officer investigate as to the title to such lands, and make a report thereon to Congress for its action, and that such Surveyor General made such investigation and made his report recommending that Congress confirm the grant of such lands; and that Congress confirmed such grant on March 1st, 1861; that such lands were surveyed under the direction of the Land Department of the United States for the amount of 69,458.33 acres; that a conflict existed between the survey of such lands, and a survey and letters patent theretofore made and issued by and on behalf of the United States to a tract of land known as

the Cañon del Agua grant; that the said New Mexico Mining Company, by means of certain false and fraudulent representations as to its ownership of all the lands described in said cross-bill, procured and induced the officers of the United States to issue letters patent to said New Mexico Mining Company for all of such lands, except 259 acres belonging to said Cañon del Agua Grant; but that said letters patent should only be construed as a quit-claim or relinquishment on the part of the United States, and should not be held to affect the adverse rights of any person or persons whomsoever. The said cross-bill then recites the taking possession of said lands by said New Mexico Mining Company; the conveyance by said company of such lands to other persons, and the taking possession of such lands by such persons, and concludes with a prayer that the interest of said complainant in said lands may be ascertained and determined, and that the said New Mexico Mining Company and other defendants may be decreed to hold the title as to such interest in trust for said complainant, and for other proper relief.

On March 5th, 1887, the said New Mexico Mining Company, the appellee here, filed its demurrer and answer to the said amended cross-bill of said Charles H. Gildersleeve, which demurrer and answer are set forth on pages 112 to 127 of the record.

After specifying what portions of said cross-bill said defendant demurs to, the defendant proceeds with its answer. The commencement of the suit by Edward T. Farish and others is admitted: It is denied that said Brevoort, Knaebel and complainant owned the lands described in said cross-bill, and that the cross-bill filed by said Brevoort was filed for the joint benefit of said parties. The grant of the lands by the Republic of Mexico prior to the cession of New Mexico to the United States is admitted as set forth in said cross-bill,

and all other material allegations of such cross-bill are admitted except as to the title and interest of the appellant in the lands in controversy. The appellee by such answer sets up and claims title to all of such lands. Its source and chain of title is by virtue of the grant made by the Mexican Government to Jose Francisco Ortiz and Ignacio Cano; the conveyance by Cano of his interest to Ortiz; the ownership by Ortiz at his death of all of said lands; the execution of a mutual will by Ortiz and his wife in 1841, by virtue of which the widow of Ortiz became the sole owner of such lands, and that said widow, while being the owner of and possessed of such lands, conveyed the same to one John Greiner, and that by virtue of divers deeds of conveyance the entire title to all of such lands became vested in said New Mexico Mining Company, and was so held at the time of the filing of such cross-bill and answer thereto.

On March 5th, 1887, said New Mexico Mining Company filed its five several pleas to the said cross-bill of the appellant, such pleas being set out on pages 128 to 130 of the record.

By the first of such pleas it is set up that the said defendant, and those under whom it claims title, had been in the exclusive possession of the lands in controversy for more than thirty years prior to the filing of the amended cross-bill of appellant, and that no suit had been successfully prosecuted within such period for the recovery of such lands by the said complainant or his assignors.

The second of such pleas sets up that the complainant and his assignors failed to commence and prosecute any suit for the recovery of such lands within ten years next after the right to commence such suit accrued to him or them.

The third of such pleas sets up that the cause of ac-

tion of the appellant did not accrue within ten years next before the filing of said amended cross-bill.

The fourth of such pleas sets up and pleads a former suit commenced by Elias Brevoort as a matter of former adjudication.

The fifth plea is to the same effect as the fourth.

On March 22d, 1887, the appellant filed his replication to the said answer of the said New Mexico Mining Company, which replication is set forth on page 131 of the record.

On the same date said appellant filed his replication to the fourth and fifth pleas of the said New Mexico Mining Company, which replication is set forth on page 132 of the record.

On the same date the appellant filed his motion to strike out, set aside and over-rule the said three first pleas of the said New Mexico Mining Company, which motion is set forth on page 133 of the record.

On August 10th, 1887, the Court on hearing said motion overruled the same, and refused to strike out and set aside said three first pleas setting up the statute of limitations. See page 133 of the record.

On August 15th, 1887, the issues formed upon the said fourth and fifth pleas of the said New Mexico Mining Company, were, by consent of the parties, submitted to the Court for hearing, and after hearing the evidence upon such issues the Court found such issues in favor of this appellant, and adjudged that the matters and things set forth in his said cross-bill had not theretofore been finally adjudicated and determined as between said appellant and said New Mexico Mining Company; which proceedings and order are set forth on pages 134 to 135 of the record.

Thereupon the Court referred said cause to a special master for the purpose of taking proofs, and the mak-

ing of his findings thereon, with directions to report the same to the Court. See page 135 of record.

None of the defendants to the amended cross-bill, filed by the appellant as above stated, ever appeared to such bill or filed answer or other pleadings thereto, other than the said New Mexico Mining Company.

On the 6th day of October, 1887, the plea of former adjudication that had been previously filed by the said New Mexico Mining Company to the original bill of complaint filed by Edward T. Farish and others came on for hearing, and the Judge, after hearing the same, sustained such plea, and adjudged that such bill be dismissed, but in such order it was expressly provided *that this order shall not prejudice any rights that C. H. Gildersleeve may have acquired as intervenor in this cause, or by reason of his cross-bill herein, but the same shall stand as they may now be for the further order of this Court.*

See page 135 of the record.

Said cause having been heard by the Special Master, on August 2d, 1888, the appellant filed with such master his objections to the report of the master. See pages 152 to 154 of record.

On August 7th, 1888, the appellee filed with such master its objections to the report of such master. See pages 155 to 156 of record.

On August 25th, 1888, said appellee filed its exceptions to the report of such master. See pages 156 to 157 of record.

On August 28th, 1888, the appellant filed his exceptions to the report of such master. See pages 158 to 160 of record.

On December 26th, 1888, the exceptions filed by the respective parties to the report of the master came on for hearing before the Judge of the District Court at

chambers, and such exceptions having been heard and considered by such Judge, it was ordered and decreed that the finding of such master upon the plea of the statute of limitations should be affirmed, and that appellant's exceptions to that portion of such master's report should be over-ruled; and that the appellee's exception to the question of the validity of the will, be sustained, it being found and determined that the will of Jose Francisco Ortiz, offered in evidence by the appellee, was valid and legal and conveyed the interest of said Ortiz in the premises in question to his widow Mariquita Montoya. It was further ordered and determined that the appellant's cause of action was barred by the statute of limitations, and that he take nothing by his bill of complaint, and that the same be dismissed. See pages 160 to 161 of record.

It will be observed that this decree is special and limited, and passes upon but two questions, viz: the question as to the action of appellant being barred by the statute of limitations, and as to the validity of the will of Ortiz.

The appellant then removed the cause by writ of error to the Supreme Court of the Territory, in which Court the appellant by assignments of error called in question the correctness of the said decree of said District Court in affirming the report of the master upon the question of the statute of limitations, and in decreeing that the cause of action of appellant was barred by the statute of limitations; and in sustaining the exceptions of appellee to the report of the master as to the validity of the will of said Jose Francisco Ortiz, and in decreeing that said will was legal, valid and sufficient to vest the title of said Ortiz in the lands in controversy in his widow, Mariquita Montoya. See pages 162 to 163 of record for assignment of errors.

At the January term, 1891, of said Supreme Court,

said cause came on for hearing, and on the 24th day of July, 1891, said Court rendered its decision in said cause, and ordered and decreed that the said decree of said District Court be affirmed, and that the bill of complaint of appellant be dismissed at his costs. See pages 163 to 164 of record.

On July 25th, 1891, the appellant filed in said cause his motion for a rehearing. See pages 164 to 165 of record, which motion was continued until the next term of said Court. See page 165 of record.

On August 21st, 1891, the said motion of appellant for a rehearing of said cause was, by said Court, overruled. See page 165 of record.

On January 4th, 1892, the same being during the same term of said Court at which said motion for a rehearing was overruled, the appellant filed in said cause his motion for an appeal to this Court. See page 166 of record.

On the same day the appellant filed in said cause his affidavit as to the value of the matter in dispute in said cause, showing the same to be of the value of more than five thousand dollars, exclusive of costs. See page 166 of record.

On January 6th, 1892, said Court granted the appellant an appeal from the decree and decision of said Court rendered as aforesaid, to this Court, and ordered that appellant file a bond in the sum of one thousand dollars, payable to the appellee, conditioned as provided by law, and said Court also ordered that a statement of the facts found to be proven and established by the evidence in said cause should be made and certified to this Court instead of the evidence at large. See page 167 of record.

On the same day said Court made and certified such

statement of facts, which is set forth on pages 167 to 184 of the record.

On January 7th, 1892, the appellant filed with the Clerk of such Court his appeal bond in pursuance of the order of such Court, which bond was approved by one of the Justices of such Court and the Clerk of such Court, and is set out on pages 184 to 185 of the record.

A copy of the opinion and decision rendered by said Territorial Supreme Court is attached to the transcript of this cause and is set forth on pages 185 to 192 of the record.

II.

QUESTIONS INVOLVED.

Both of the parties, the appellant and appellee, claim title from the same source. That is, they each claim, by their pleadings, that the property in controversy was granted by the government of Mexico in the year 1833 to Jose Francisco Ortiz and Ignacio Cano; that said Ortiz, during his life, acquired the interest of said Cano in said property, and that Ortiz, at his death, held and possessed all the claim, title and interest in said property that was conveyed to or vested in said Ortiz and Cano by the Mexican government; that the title held by Ortiz to such property at the date of the cession of the Territory of New Mexico was not a perfect legal title, but was only an equitable or inchoate title, and that it was necessary to have such title perfected under the laws of the United States, and that proceedings were had under such laws, and the title to such property thereby became perfected in the heirs, legal representatives or assigns of said Francisco Ortiz.

At this point the contention between the parties begins. The appellant claims that said Jose Francisco

Ortiz died intestate, and that his interest in the property in dispute descended to his legal heirs, while the appellee contends that said Ortiz, at his death, left a will, by virtue of which, his widow, Maraquita Montoya, became the sole owner of such property. The facts found by the Court below, and set forth in the special finding of facts, are sufficient to vest in the appellant title to the undivided one-fourth of the property in controversy, provided said Ortiz died intestate, and on the the other hand, the facts so found are sufficient to vest in the appellee title to all of such property if the purported will of said Ortiz is a legal and valid instrument, and has been so proven and established as to make it effective for the purpose of vesting title to such property in the widow of said Ortiz.

The appellee further contends that the cause of action of the appellant was barred by the statute of limitations of the Territory of New Mexico before the suit of appellant was instituted. It is apparent, therefore, that the main or principal questions to be determined are these:

First: Is the purported will of Jose Francisco Ortiz a legal and valid instrument as such, and did the title to the property in controversy vest in the widow of said Ortiz under such will, and

Second: Was the cause of action of the appellant barred by the statute of limitations of the Territory of New Mexico at the time the suit of appellant was commenced.

By referring to the decree of the District Court of Santa Fe county, on pages 160 to 161 of the record, it will be observed that such Court only passed upon and decided these two questions, and the Territorial Supreme Court simply affirmed the decree of said District Court, and limited its decree and decision to the same

two questions. See page 187 of record for decree of Supreme Court.

ASSIGNMENT OF ERRORS.

The appellant now comes and says that there is manifest error in the record, proceedings, decree and decision of this cause as follows, to-wit:

1. The Supreme Court of the Territory of New Mexico committed error in affirming the decree of the District Court of Santa Fe county, in said Territory, and in refusing to vacate, set aside and reverse said decree of said District Court.

2. The said Territorial Supreme Court committed error in holding and decreeing that the purported will of Jose Francisco Ortiz, introduced in evidence in said cause by the appellee, was and is a legal and valid will, legally and properly executed, and was sufficient to and did vest the title of the property in controversy in Mariquita Montoya, the widow of said Ortiz.

3. The said Territorial Supreme Court committed error in holding and decreeing that the purported will of Jose Francisco Ortiz, was sufficient to and did vest the title of the property in controversy in the said widow of said Ortiz, without the said will ever having been proven, established or admitted to probate.

4. The said Territorial Supreme Court committed error in holding and decreeing that the cause of action of the appellant was and is barred by the statute of limitations of the Territory of New Mexico.

III.

ARGUMENT AND AUTHORITIES.

The first question that naturally arises, and which we will first consider, is the force, effect and validity of the purported

of Jose Francisco Ortiz, and his wife, Maria Ynes Montoya, introduced in evidence on behalf of the appellee.

A will only takes effect on the death of the testator. Before that time it is merely inchoate, or deliberative, intended to become operative in the event of death, but liable at any moment to be altered or annulled.

2 Redfield on Wills, page 1, Sec. 1.

A will should be executed in conformity with the laws in force at the death of the testator.

Sutton v. Chenault, 18 Ga. 1.
Price v. Taylor, 28 Penn. st. 95.
Loverin v. Lamprey, 2 Foster, 434.
1 Redfield on Wills, p. 226, Sec. 27, p. 255, Sec. 5.
Hoffman v. Hoffman, 26 Ala. 535.
Jones v. Robinson, 17 Ohio st. 171.
Houston v. Houston, 3 McCord (S. C.) 491.
Nat. v. Coons, 10 Mo. 543.
Grimes v. Norris, 6 Cal. 621.

In September, 1846, the Kearney Code was put in force in the Territory of New Mexico.

Section 1 of such Code, under the head of "Administrations," as set out on page 84 of the Compiled Laws of 1884, of the Territory, is as follows:

"The laws heretofore in force concerning descents, distributions, wills and testaments, as contained in the treatise on these subjects, written by Pedro Murillo Velarde, shall remain in force so far as they are in conformity with the Constitution of the United States and the State [statute] laws in force for the time being."

Jose Francisco Ortiz died July 22, 1848, (See record, pages 178 and 183) being found as a fact by the Court below. The Kearney Code had at such date

been in force near two years. The purported will of said Ortiz and his wife was found by the Court below to have been executed in August, 1841, (See record, page 172), which was during the time the Territory of New Mexico was under the control of the Republic of Mexico. The provisional government established in New Mexico, and commonly known as the "Kearny Code," has been recognized by this Court as legal and valid, and held to have continued in force until changed by the legislation of Congress, or the Territorial Government established by its authority.

Leitensdorfer vs. Webb, 20 How. 176.

The Supreme Court of New Mexico in the case of Bent v. Thompson, (decided Jan. 23, 1890, and reported in 23 Pac. Rep. 234,) held that the Laws of Pedro Murillo Velarde, in relation to the execution and proving (or probating) of wills, was in force at the time of the treaty of peace between Mexico and the United States, and was continued in force by the Kearny Code, a more extensive reference to which decision will hereafter be made.

Witnesses to Wills: The appellant insists that the pretended will of Ortiz and his wife was not executed in the manner and form required by the Laws of Velarde. This will falls within the class termed by such Laws as an open or unsealed testament, and in Chapter 1, of Velarde, it is provided that,

"The second formality consists in the presence of witnesses. For the open testament at least three are required, residents of the place where the testament is made, and it should be executed before a notary public. In the absence of a notary, five witnesses, residents of the place, should assist; and if they should not be obtainable, three will be sufficient."

On referring to the record (pages 172 to 173) where

the finding of facts as to the execution of such will are set forth, it will be found that but two witnesses attested the execution of such will. A copy of such will is also set forth in the opinion of the Supreme Court of New Mexico. See record, page 186.

It will be observed that such will was not executed before a notary public, but before "the citizen Albino Chacon, Constitutional Alcalde," and that but two witnesses attest the execution of the instrument. By the Laws of Velarde, *three* witness were reguired when the will was made before a notary, and *five* when not executed before such an officer. Again, such witnesses were required to be residents of the place where the will was executed, and there is nothing to indicate the competency of the two witnesses that attested the execution of this pretended will.

See 1 White's Recopilation, page 98.

Schmidt's Civil Law of Spain and Mexico, page 214, Arts. 1011, 1012, 1013 and 1014.

Probate of Wills: If the will in question should be found to have been executed with the necessary legal formalities, yet it would have no effect as an instrument to convey title to property until it was properly proven or probated.

In 2 Redfield on Wills, p. 53, Sec. 6, it is said:

"The effect of probate is to establish the words of the *probate as the legal will of the deceased.*" See page 255, Sec. 5.

In 1 White's Recopilation, p. 111, it is said:

"In order to know to whom delivery of the inheritance is to be given, publication of the will is made, for which purpose those interested appear before the judge presenting a petition, praying that the witnesses may be ordered to acknowledge their signatures," etc.

The Court in the case of Bent vs. Thompson above

referred to, and reported in 23 Pac. Rep. 234, in speaking of the proving or probating of wills under the civil law, uses this language:

"Under the civil law, the only provisions made for proving a will (which is equivalent to probating) are as follows: In order that an open testament, made before witnesses without a notary, can have effect, it must be declared valid by the judge. For the purpose of obtaining his sanction, any one having an interest in its disposition may apply to the judge, who must summon the witnesses present at the execution of the testament; and, upon his finding that it has been truly made, he shall declare it a valid testament, and order it to be inscribed in the registers of some notary. Schmidt Laws Spain and Mexico, pp. 214, 215. Art. 1015 * * *

The laws of Pedro Murillo Velarde are almost identical, and provide: "Chapter 15," That part of the chapter relating to the proving of sealed testaments is then set forth, and on page 237 of the report, it is said:

"If the testamentary disposition should be written on common paper, but before the competent number of witnesses, the heir or executor shall apply to the judge presenting it to him, stating (the name of) the person who wrote it, that which passed at that time, the reason why it was made so, and without the presence of a notary, and that the testator died under it; and asking that, after taking the declaration of the witnesses and the acknowledgment of their signatures, that that disposition be declared a nuncupative testament, that there be given the proper copies to the parties in interest, and that it be filed in the record of a notary. The judge shall direct that the information be received, and, it being done, he shall proceed accordingly."

The Kearney Code, in force at the date of the death

of Ortiz, made provisions for the probating of wills and the issuing of letters testamentary and of administration. The provisions of such Code on that subject are found on pp. 84, 85 and 86 of Compiled Laws of New Mexico and are as follows:

"Sec. 2. The prefects shall grant letters testamentary and of administration."

"Sec. 7. After the probate of any will, letters testamentary shall be granted to the person or persons therein appointed executor or executors; if a part of the persons refuse to act, or be disqualified, the letters shall be granted to the other persons therein appointed. If all such persons refuse to act, or be disqualified, letters of administration shall be granted to the person to whom administration would have been granted if there had been no will; when there are two or more persons named executors in a will none shall have power to act as such except those who give bonds as such."

"Sec. 8. If the validity of a will be contested, or the executor be a minor or absent from the Territory, letters of administration shall be granted during the time of such contest, minority, or absence, to some other person, who shall take charge of the property and administer the same according to the law under the direction of the prefect, and account for, pay and deliver all the money and property of the estate to the executor or regular administrator when qualified to act."

On page 114 of the Compiled Laws of New Mexico, of 1884, is found the following provision:

"Section 1. All laws heretofore in force in this Territory, which are not repugnant to or inconsistent with the Constitution of the United States and the laws thereof, or the statute laws in force for the time being, shall be the rule of action and decision in this Territory."

The case of Bent vs. Thompson, above referred to and quoted from, was removed to this Court by appeal, and the decision rendered in such cause by the Supreme Court of New Mexico was affirmed by this Court, the decision being reported in 138 U. S. Rep. on page 114, and in such decision in considering the probate of wills in New Mexico, this language is used:

"The Supreme Court held that the civil law was in force in New Mexico, and it examined the provisions thereof in regard to proving a will, and arrived at the conclusion that any person interested could have a will probated, without notice to the heirs or other interested parties, it being required only that witnesses should be summoned, and only one form of probate being prescribed; that, by the Kearney Code of 1846, the prior "laws of Velarde," in relation to the execution and proving of wills and the administration of the estates of deceased persons, dating back to 1790, were continued in force."

In the case of Morgan vs. Boyle, 19 How. 130, this Court on page 149, says:

"By the Spanish law, a will was required to be proved by the attesting witnesses within one month after the decease of the testator; and when proved, it is required to be recorded."

We do not think that it can be seriously contended but that at the date of the death of Jose Francisco Ortiz, in 1848, the laws in force in the Territory of New Mexico required wills to be proven or probated before they became effective to confer title to property.

Let us see what the facts are in relation to the proving or establishing the will in question, as shown by the finding of facts of the Territorial Supreme Court.

On pages 172 to 183 of the record, the facts in relation to the possession and proof of such will are set

forth. It appears that from the death of Jose Francisco Ortiz in July, 1848, the said will remained in the possession of his widow, Maraquita Montoya, until her death in 1870; that in the year 1855, such will was found among the papers of said widow by her niece, and at the request of said widow such will was taken possession of by the said niece, and retained by her until the year 1873; and that in the year 1874 said niece delivered such will to one Salazar to be delivered by him to Stephen B. Elkins, the then legal representative of the appellee, The New Mexico Mining Company. On page 173 of the record, it is stated as a fact: "That the said will was never proved or admitted to probate as the last will of either Jose Francisco Ortiz, his wife Maria Ynez Montoya, or anyone else."

On page 183 of the record, the said Supreme Court makes this finding of fact.

"11. That there is no evidence to show that said Maria Ynez Montoya ever claimed the property in controversy as an inheritance from her said husband through, under or by virtue of said mutual will, except in deed of conveyance to John Greiner, where it recites that "she is the widow and sole heir" of Jose Francisco Ortiz."

We submit that this recital indicates that at the time of the execution of such deed such widow claimed title to the lands as an heir at law of her deceased husband, and not as a devisee under the will, and this view is emphasized by the fact that at the date of such conveyance such widow, so far as the facts show, had not made known the existence of such will, and had not taken any steps to have it proven or established.

On January 12, 1852, the Legislature of the Territory of New Mexico enacted a statute relating to wills,

the 17th section of such statute being now the 1393 section of the Compiled Laws of the Territory, and is as follows:

"§ 1393. Probate judges, in their respective counties, are authorized to qualify wills, by receiving the evidence of the witnesses who were present at the time of making the same, and all other acts in relation to the investigation of the validity thereof."

There was nothing to prevent the widow of Jose Francisco Ortiz from probating and proving the purported will left by him under this statute, said Ortiz having been dead less than four years at the time of the passage of the act. At all times from the date of the death of said Jose Francisco Ortiz until the present time, there has been in force in the Territory of New Mexico laws providing for the proof or probate of wills.

The learned Supreme Court of New Mexico in its consideration and decision of this cause seems to have entirely ignored the question of proving or probating wills. In the opinion of the Court, in speaking of the validity of the will, it is said: "If it were recognized by the laws of the sister republic, and executed in accordance therewith, or in accordance with prevailing customs and usages, having the force of law, it is the duty of the Courts of this Territory to give it the same legal effect as it would receive had no change of government taken place."

This statement is open to at least two serious objections. First, the facts upon which the decision is based do not show that the purported will was executed in accordance with the laws in force in New Mexico at the time of its execution, and, second, the Court seems to have proceeded upon the idea that the laws in force at the time of the *execution* of a will, as to the execution thereof, control, when we conceive the rule to be that a

will must be executed in conformity with the laws in force at the death of the testator. There are no vested rights in laws prescribing the manner of executing wills, and we believe the law to be that if the manner of executing a will is changed between the time of such execution and the death of the testator, then the testator must see that his will is executed in conformity to the later law in order that it may be effective, as a will only operates and has effect from the death of the testator and not from the time of its execution.

Said Supreme Court also sought to uphold the purported will upon the ground that at the date of such will, and prior thereto, there was a general uniform custom existing in New Mexico as to the manner of executing wills, and that such will was executed in accordance with such custom. It seems that a sufficient answer to this position should be that in the statement of facts certified by such Court to this Court, there is no fact found or stated which shows or tends to show that any such custom ever had an existence in the Territory of New Mexico. Besides, if such a matter could be regulated by custom, the custom would have to be in existence at the death of the testator, and the will would have to be executed in accordance with the custom or law in force at that time.

A custom or usage can never be invoked to control an express statute or law.

Walker vs. Transportation Co. 3 Wall. 150.
Cranwell vs. Fosdick, 15 La. Ann. 436.
Adams vs. Otterback, 15 How. 539.
Cox vs. O'Riley, 4 Ind. 368.
Strong vs. Bliss, (6 Metc.) 47 Mass. 392.

We think that we have sufficiently shown that, at the date of the purported will, and also at the time of the death of Jose Francisco Ortiz, there were laws in force

in New Mexico regulating and prescribing the manner of executing wills, and the proof or probate thereof.

The finding of facts by the Territorial Supreme Court is conclusive on this Court.

Idaho, etc., Co. vs. Bradbury, 132 U. S. 509.

STATUTE OF LIMITATIONS.

We now come to consider the question as to the statute of limitations. The Territorial Supreme Court held that the cause of action of the appellant was barred by the statute of limitations of the Territory.

In 1865 the Territorial Legislature enacted a statute of limitations, one portion of which is now section 1880 of the Compiled Laws of 1884, of the Territory, which is as follows:

"§ 1880. In all cases where any person or persons, their children, heirs or assigns, shall, at the passing of this act or at any time after, having had possession for ten years of any lands, tenements or hereditaments which have been granted by the governments of Spain, Mexico or the United States, or by whatsoever authority empowered by said governments to make grants to lands, holding or claiming the same by virtue of a deed or deeds of conveyance, devise, grant or other assurance purporting to convey an estate in fee simple, and no claim by suit in law or equity effectually prosecuted shall have been set up or made to the said lands, tenements or hereditaments, within the aforesaid time of ten years, then and in that case, the person or persons, their children, heirs or assigns, so holding possession as aforesaid, shall be entitled to keep and hold in possession such quantity of lands as shall be specified and described in his, her or their deed of conveyance, devise, grant or other assurance as aforesaid, in preference to all, and against all, and all manner of person or

persons whatsoever; and any person or persons, their children or their heirs or assigns, who shall neglect or who have neglected for the said term of ten years, to avail themselves of the benefit of any title, legal or equitable, which he, she or they may have to any lands, tenements or hereditaments, within this Territory, by suit of law or equity effectually prosecuted against the person or persons so as aforesaid in possession, shall be forever barred, and the person or persons, their children, heirs or assigns so holding or keeping possession as aforesaid by the term of ten years, shall have a good and indefeasible title in fee simple to such lands, tenements or hereditaments."

There is a proviso added to such section relating to the rights of persons who may be under legal disabilities, but as such proviso can have no bearing on this case the same is omitted.

It was evidently the purpose of the legislature to set the statute in motion as to lands held or claimed under grants made by either of the governments of Spain, Mexico or the United States, only when lands were claimed by virtue of a *deed or deeds of conveyance, devise, grant or other assurance purporting to convey an estate in fee simple.*

The law-making power doubtless recognized the fact that at the time of the passage of such statute there were many conflicting claims to lands in this Territory under grants made by Spain and Mexico, and that the claimants were not in a position to assert their titles in the Courts, by reason of the fact that their claims had never been recognized by the United States; and as to such cases the statute was limited to those where the parties claimed under a written evidence of title that purported to convey a fee simple title.

The case now under consideration belongs to the

class of cases provided for in section 1880 of the Comp. Laws; both parties asserting that the title to the premises in controversy is based upon a grant made by the Mexican government, but inchoate and not complete until confirmed and recognized on the part of the United States.

In order to arrive at a proper understanding of this question a brief history of the grant or concession made by the Mexican government, and of the subsequent proceedings had in connection therewith, is necessary.

The original grantees of the property, in their petition, requested that they be granted property described as follows:

"A new vein which is in the Oso Mountains, in the rear of a compromise mine to the west, its direction running across from north to south, to which we give the name of Sta. Rosalia, and we promise to work it for silver, gold and copper," etc.

In the certificate of the Alcalde, setting forth the delivery of possession of the property to the grantees, he describes the property so delivered as follows: "Measuring out to them on the north from the orifice of the mine eighty varas, sufficient to form a boundary fronting the south from the mine of Santo Niño, which Dolores Jaloma & Co. are working, and in a southern direction five hundred and twenty varas, which, added to the eighty varas already mentioned, make up the six hundred of the three dependencies which accrue to them as discoverers."

As to the application of the grantees for water supplies and rights of common for pasturage, the Alcalde certifies that:

"I, the aforesaid Alcalde, in compliance therewith, and in the name of the August Mexican Nation, grant to them as water supplies to work their machinery, the

Oso Spring, contiguous to D. Jose Francisco Ortiz's dwelling, as well as other springs which may be included within the limits of the commons which may be granted to them in the direction of the east and as pasture commons two leagues for each of the four cardinal points of the mine."

See pages 168 to 184 of the record, where these matters appear in the finding of facts by the Territorial Supreme Court. The same matters appear in substance in the letters patent, issued for the lands in controversy, which appear on pages 15 to 23 of the record.

It will thus be seen that the only property absolutely granted, measured off and identified, and actually put in the possession of the grantees, was the mine consisting of six hundred varas in extent. Whatever other rights were conceded as to the use of water or pasturage were mere privileges that were to be enjoyed by such grantees in connection with others that might be granted the same rights.

Thus matters remained until Dec. 26, 1853, when the widow of Jose Francisco Ortiz made a deed to John Greiner, in which deed the property is described as follows:

"A certain parcel of land, on which is a gold mine known by the name of Santa Rosalia, situated in the Real de Dolores, in the county of Santa Fé aforesaid, the vein of said mine traversing from north to south the mountain called 'Oso,' and bounded and described as follows, to wit: Measuring from east to west, under the said vein, fifteen varas, measuring south from the mouth of the mine eighty varas to the southern boundary of the mine formerly known by the name of Santo Niño, and now owned by said John Greiner and others, and measuring five hundred and twenty varas; also a certain house situated near said mine, now occupied by

Juan Ortiz as a tenant at will, also the Oso Springs situated near said house, with all the privileges of the water for watering place, and use of machinery in the working of said mine, and also right of commons and pasture for the distance of two leagues, measuring from the mine to all the cardinal points of the compass."

This conveyance is the starting point of the claim of title of the appellee, and upon which it must base its right to hold under the statute of limitations.

Attention is called to the fact that Mariquita Montoya, by this deed, did not attempt to convey in fee anything except the mine of six hundred varas, the house situated near the mine, occupied by Juan Ortiz, and the Oso Springs near the house. Whatever other rights she conveyed or attempted to convey, were mere *privileges*, as expressed in the deed. If she was conveying in fee simple the entire tract of land now in controversy, why the necessity of describing the mine by varas, the house or the spring, as a conveyance of the land on which they were situated would have carried them also? And if she intended to convey the entire tract, what could have been the purpose of stating that she granted the *privileges of the water*, the *use* of *machinery* and *right* of *commons* and *pasture?* A conveyance of the fee would have conveyed all these without special mention, and the fact that they are mentioned excludes the idea that the parties understood that the fee to all the property mentioned was intended to be conveyed.

The next link in the chain of title of the appellee is a deed executed by John Greiner and wife on August 19th, 1854, to Elisha Whittelsey, Charles E. Sherman, Joseph T. Walker, Ferdinand W. Risque, Abraham Rencher, Nathaniel W. Miller and Andrew J. O'Bannon.

The description of the property now in controversy

is described in said deed in the same manner as in the deed from Montoya to Greiner, as above set forth.

It is also specified in said deed the particular interests that each of the grantees are to have in the property.

The next deed introduced in evidence by the appellee in support of its claim, is a deed executed on the 16th day of July, 1864, by Charles E. Sherman and Lewis S. Coryell parties of the first part, John L. Kidwell party of the second part, and the New Mexico Mining Company, party of the third part.

This deed purports to convey the property in controversy to the New Mexico Mining Company.

The grantors are Charles E. Sherman, Lewis S. Coryell and John L. Kidwell. Sherman is the only one of the grantors who appears to have had any title to the property and he only one-ninth interest that he acquired under the deed from Greiner and wife of Aug. 19, 1854, as above stated. This is the first deed in which anything more than the mine is attempted to be absolutely conveyed. The mine is first described as in the two former deeds, and then the description proceeds, "also a tract of land measuring the distance of two leagues from the said mine to all the cardinal points of the compass, the same containing sixty nine thousand four hundred and fifty-eight acres and thirty-three hundredths of an acre," etc.

This is the first deed that can be said to pretend to convey a *fee simple estate*, within the meaning of the statute of limitations, to the entire tract of land in controversy.

This deed bears date in the caption July 16, 1864, but the last certificate of acknowledgment is dated July 20th, 1864, and it will not be presumed to have been delivered prior to the latter date.

On January 20, 1880, the New Mexico Mining Company conveyed the lands to S. B. Elkins, and Jerome B. Chaffee, and on April 4th, 1884, Elkins and Chaffee conveyed 54,000 acres of the tract to the New Mexico Mining Company, which deeds have hereinbefore been referred to.

The facts as to the above named several conveyances are set forth on pages 177 to 184 of the record, the same being in the special finding of facts certified by the Supreme Court of the Territory.

Proceedings on part of U. S: To determine whether or not at the date of these various deeds there was any such tract of land, the boundaries of which had been definitely ascertained and determined, and to which these deeds could apply and the execution of which could carry constructive possession to the lands attempted to be conveyed, it is necessary to revert to the action on the part of the United States and learn when that government segregated such lands from the public domain, parted with its title or claims thereto, and finally established the boundaries thereof.

It will be remembered that the petition presented to the Surveyor General of the Territory, a copy of which is set out on pages 145 to 147 of the record, does not describe the lands claimed, nor is there, in any of the proceedings before that officer, a description of any lands given by which any particular tract of land could be located or identified. In his report on the claim to Congress the reference to the lands claimed is as follows:

"This grant of a mine is situated about twenty-five miles south of this city in the Oso (Bear) mountain and called 'Santa Rosalia.'" He then states that the original claimants petitioned "for a grant of registration to this mine," and that it was placed in their possession.

He then says: "The parties then in legal form, and in accordance with the provisions of the laws solicited a grant in accordance with the laws of the water and commons for the machinery and pasture," and that "the Alcalde, in the name of the Mexican Nation, granted to said petitioners the Oso Springs, and all the commons and pasture ground within two leagues measured from the mine to the four cardinal points." His report concludes by a recommendation to the Congress of the United States that the grant be confirmed. See pages 136 to 137 of the record.

This is the report and the proceedings that were before Congress when the act of confirmation was passed. That act provides:

"That the private land claim in the Territory of New Mexico, as recommended for confirmation by the Surveyor General of that Territory, in his report to the Commissioner of the General Land office, of November twenty-fourth, eigteen hundred and sixty, designated as number forty-three, be and the same is hereby confirmed."

12 U. S. Stat. 887.

Now suppose that nothing more had ever been done upon the part of the United States in reference to identifying or locating the lands, can it be contended that any person could have maintained an action for their possession?

Necessity of Survey: The appellant contends that it was absolutely necessary, in order to locate and identify the land granted, to have a survey thereof, and that the government of the United States was the only authority authorized to make such survey.

This Court, in the case of Stanford vs. Taylor, 18 How., on page 412, says:

"The law is settled, that where there is a specific

tract of land confirmed, according to *ascertained* boundaries, the confirmee takes a title on which he may sue in ejectment. The case of Bissell vs. Penrose, 8 How. 317, lays down the true rule. But where the claim has no certain limits, and the judgment of confirmation carries along with it the condition that the land shall be surveyed, and severed from the public domain and the lands of others, then it is not open to controversy, that the title attaches to no land; nor has a Court of Justice any authority in law to ascertain and establish its boundaries, this being reserved to the executive department. The case of West vs. Cochran, 17 How, 403, need only be referred to as settling the point."

See also Carpenter vs. Montgomery 13 Wall, 480.

Nor is the making and the approval of a survey by the Surveyor General such an identification or location of the land as will set the statute of limitations in motion.

At one time it was held by the Supreme Court of California that the approval by the Surveyor General of that State of the survey of a private land claim was conclusive of the correctness of the survey, but in the case of Johnson vs. VanDyke the Court held otherwise, and on page 229 of Vol. 20 of the Cal. reports the Court said that in accordance with the decision of the Supreme Court of the United States in Castro vs. Hendricks, the Commissioner of the General Land Office exercised a supervision over surveys, and that there was no finality to a survey until it received the approval of that officer, and that

"*His approval was followed and evidenced only by the patent. Until then it could not be said that the title was, by the government of the United States or its legally constituted authorities, finally confirmed to the premises in controversy.*"

The same Court, in the case of Miller vs. Dale, in 44 Cal. on page 574, said:

"The plaintiff's approved survey is not the equivalent of a patent. It could not have the force and effect of a patent unless such force and effect were given to it by express statutory enactment."

This Court, in the case of Castro vs. Hendricks, in 23 How. on page 443, says:

"But, then, the Commissioner of the Land Office, by virtue of enabling acts of Congress, exercises a supervision and control over the acts of the subordinate officers charged with making surveys; and it is his duty to see that the location and survey made by that officer under the decree of the Court, and which had not had the final sanction of the judicial tribunals, is in accordance with the decree."

The same Court, in the case of Henshaw vs. Bissell, 18 Wall, on page 269, says:

"The whole subject of surveys is under the control of Congress, and until the patent issues thereon, any survey may be set aside and a new one ordered by its authority."

See also Van Reynegan vs. Bolton, 95 U. S. 33.
Maguire vs. Tyler, 1 Black, 195.
Snyder vs. Sickles, 98 U. S. 203.

The survey of the property in controversy was authorized by law. It was under the control of the Land Department of the government, and the record in this case shows that such survey was being actually considered by such Department and was a subject of controversy between the government and grant claimants until the decision of the Secretary of the Interior in relation thereto, was made on April 22d, 1876, as shown by the special finding of facts, record pages 176 and 177, and

such survey was still under the control of such Department until the patent was actually issued and delivered.

The paramount title of the United States to the land in controversy, was, as the case is now presented, vested in the appellee by the patent only. Appellee so admits in its answer, and the evidence and pleadings show that the appellee submitted to the jurisdiction of the Land Department by applying for and accepting a survey and patent for the grant. It is, therefore, now estopped from denying the admission of its answer as well as the adjudication of the jurisdiction to which it voluntarily submitted its case.

More vs. Stienbach, 127 U. S. 81, 82.

Bigelow on Estoppel, Ed. 1886, p. p. 642 et seq. and 687 et seq.

Congress, by the act of 1869, provided that this and other grants should be surveyed and patented, which was a legislative construction that such survey and patent was necessary to divest the title of the United States under the confirmation.

See act March 3, 1869, 15 Stats. 342.

Opinion Att'y Gen'l, Copps Land Laws, Ed. 1875, p, 607.

Meader vs. Norton, 11 Wall, 442.

The wife of Ortiz sold only her interest, or one-half of the claim. Her grantee is the grantor under whom the appellee claims title. The appellant claims title under the heirs of Ortiz. The grantee of Ortiz's wife taking but one-half, the wife's half, he became a tenant in common with the heirs as to the heirs' half, and as he was a tenant in common his possession was the possession of himself and his co-tenants.

Warfield vs. Lindell 77, Am. Dec. 614 and cases cited.

Clymer vs. Dawkins, 3 How. 674.

But the same result is arrived at in this case by admitting that the patent is a nullity, and that the law, as claimed by appellee, is correct as to the want of a necessity for patent and the vesting of the title of the United States without a patent.

The title of land can be in but one place at any one time, and it is admitted that the title of the land was in the United States until it vested elsewhere by some act of that government. Appellee claims that it vested in it by the act of confirmation of 1861, which contained no provision for a patent. In other words, that the grant was a legislative one in which no patent or further step was necessary to vest title, and the decisions of the Supreme Court of the United States in the case of Ryan vs. Carter, 93 U. S., 78, and of Whitney vs. Morron, 112 U. S. 693, are relied upon by the appellee. We admit the soundness of the law cited, but deny its application. We admit, a grant may be made by the legislature confirming a title, and that such legislative grants may vest the title of the United States as completely as a patent, *provided* the boundaries of the grant so confirmed are definitely fixed and ascertained.

In such cases the legislative grant takes effect from the date of the act. But such is not the case where such boundaries are uncertain or not definitely fixed by the title upon which the confirmatory act operates. When such boundaries are uncertain or indefinite the confirmatory act does not pass title until the tract has received a definite location and become certain by a survey made by the proper officer of the government.

Maguire vs. Tyler, 8 Wall., 650-660.

Snyder vs. Sickles, 98 U. S., (8 Otto) 203-211.

Sec. 728, Sedgwick & Wait Trial Titles to land.

Carpenter vs. Montgomery, 13 Wall. 480.

The proper officers to make such a location in this

case were the officers of the Land Department of the United States.

Ballance vs. Forsythe, 24 How., 183.

Castro vs. Hendricks, 23 How., 438.

The title upon which the comfirmatory act in this case acted does not describe any land whatever. The granting words are simply "two square leagues for each of the cardinal points of the mine," but whether such leagues are near or distant from the mine, or in what form they are to be located, it is not shown. The Alcalde professed to act, so he states, under Sec. 3 of Art. 13 of the Mining ordinance, but that section only serves to confuse the location still further, for it does not provide how the leagues shall be laid off, but does provide that they shall be "in the immediate vicinity of the mine," thus showing that they may be laid off on either side and not adjoining the mine. This is more evident when we consider that only the *use* of such lands were granted, and that the use was a common one to all miners of the locality for pasturing their animals used in their mines. As it often occurred that mines adjoined each other, it was impossible that each mine could have its pasture adjoining, or in any regular shape, without covering the surface ground of adjoining mines.

Halleck's Min. Law Spain and Mex., p. 264.

There were evidently mines in the immediate vicinity of the one granted to Ortiz and Cano, for in describing such mine the Alcalde states that he measured out to them on the north eighty varas, "sufficient to form a boundary fronting the south from the mine of Santo Niño, which Dolores, Jaloma & Co., are working."

Record, page 149.

Manifestly then, with such description, some one under the decisions must locate the claim before the con-

firmation could take effect. The proper persons for that purpose were the officers of the Land Department of the government.

Ballance vs. Forsythe, 24 How. 183.
Castro vs. Hendricks, 23 How. 438.
More vs. Steinbach, 127 U. S. 81.

It was the *grant as recommended* for confirmation and the "*recommendation*" of the Surveyor General is contained in the latter part of his *report* and is simply that the grant is genuine and should be confirmed.

He had no power or authority to investigate the claims of third persons to the grant, and whatever is said in his report as to the ownership of the same was outside of his duty and must be disregarded.

See case of Chaves vs. Whitney, decided by the Supreme Court of N. M., January term, 1888, and reported in 16 Pac. Rep. 608, and Pinkerton vs. Ledoux, 129 U. S. Rep. 346.

The grant papers referred to by the Surveyor General spoke and now speak for themselves as to such boundaries, and there is nothing in them or the "recommendation" or the confirmatory act to show where the land is.

The land included in the grant was, however, for the first time, fixed on the earth's surface in 1876 by the Secretary of the Interior, and was evidenced by the issuing of a patent, and such location has since been conclusive in all Courts.

In 1876 then, the confirmatory act first attached to a tract of land with fixed definite boundaries. Then the statute of limitations first began to run, for until then the title was in the United States, and no act of the Legislature of New Mexico could, by limitation or otherwise, affect the title until it passed from the United States.

Gibson vs. Choteau, 13 Wall. 92.
Henshaw vs. Bissell, 18 Wall. 255.
Sec. 1851, Organic Act, Comp. Laws, p. 59.
Redfield vs. Parks, 132 U. S. 239.
King vs. Thomas, 6 Montana, 409.

Necessity of Patent: A patent was required to be issued for the land in controversy as evidence of final and conclusive action on the part of the United States.

The Supreme Court of California, in the case of Stark vs. Barrett, on page 366 of 15 Cal. Rep., said:

"The patent is the last act of a series of proceedings taken from the recognization and confirmation of the patentee's right to the land it embraces, the first of which is the petition to the board of Land Commissioners."

The same Court, in considering the use and effect of a patent in such cases, in the case of Leese vs. Clark on page 572 of 18 Cal. Rep., said:

"But the patent has a still further operation and effect. It is not merely a deed of the United States, conveying whatever interests they may have held in the premises at the institution of proceedings before the Land Commissioner. It is also a record of the government, showing its action and judgment with respect to the title of the patentees at the date of the cession."

This Court, in the case of Henshaw vs. Bissell, on page 270, 18 Wall., in considering the effect of the proceedings required for the settlement of private land claims in California, said:

"As a result of the proceedings required, the government, in effect, promised, in case his claim was found to be valid, to give him in its patent such evidence of title as would secure to him the possession and enjoyment of his land."

Until the patent issues the fee is in the United States.
Meader vs. Norton, 11 Wall., 442.
Redfield vs. Parks, 132 U. S. 239.

Operation of Statute: If the statute of limitations began to run before the issuing of the patent, it ran as to both parties. If it ran in favor of the confirmees, it ran against them.

Suppose the grant had been surveyed for only four square leagues, instead of four leagues square, or sixteen square leagues, and immediately after the survey persons had settled upon the lands outside of the four leagues, but within the limits of the sixteen leagues, and had remained in possession of portions of the tract for ten years, and after the lapse of that time a new survey had been ordered by the proper authorities and under such survey sixteen leagues were included, covering the land so settled upon, and a patent had issued in accordance with the survey for sixteen leagues; can it be said that such settlers would hold the land occupied by them as against the patentees?

We submit that the legislature of New Mexico possesses no power to pass a statute of limitations that will begin to run as to lands claimed by grants made by the Spanish or Mexican governments, until after the United States has finally recognized the validity of the claim and has determined its location and extent, and we direct the special attention of the Court to the case of Henshaw vs. Bissell, reported in 18 Wallace 255. In considering the effect of the statute of limitations of the State of California as to lands derived from the Spanish or Mexican governments, such Court, on page 270 of said report, uses this language:

"While proceedings were pending before the tribunals of the United States for the confirmation of the claim under the Flugge grant, the statute did not

run and could not run against the right of the claimant to the land in controversy. He was obliged by the legislation of Congress to present his claim for investigation and determination, under pain of being held to have abandoned it, and was subjected to numerous expensive proceedings to establish its validity. As a result of the proceedings required, the government, in effect, promised, in case his claim was found to be valid, to give him in its patent, such evidence of title as would secure to him the possession and enjoyment of his land. The legislation of Congress, imposing this burden upon the claimant and promising this benefit to him, is not the subject of any constitutional objection, and it is not, therefore, within the power of the Legislature of a State to defeat its operation. It was adopted by the government in the discharge of its treaty obligations, with respect to which its authority is absolute and supreme. *The action of the government thereunder, and the rights which perfected title insures to its possessor, can not be impaired or defeated in any respect by the statute of limitations of the State. That statute can only begin to run against the title perfected under the legislation of Congress from the date of its consummation.*"

The decision in the above case was rendered in 1873, and in 1874, Judge Sawyer, Judge of the Circuit Court, District of California, in passing upon a similar question, took occasion to review the decision in Henshaw vs. Bissell, and in doing so said:

"But the learned Justice of the Supreme Court assigned to the circuit, in a case arising under the Sutter grant, recently tried, expressed a different opinion, and held that the title was not so far perfected as to set the statute in motion until the patent issued. Since that time, the case of Henshaw vs. Bissell has been decided by the Supreme Court of the United States, in which

the same learned Justice delivered the opinion, and, although he does not use the term patent in determining the point of time at which the statute begins to run, but says that the statute can only begin to run against the title perfected under legislation of Congress, from the date of its consummation. I have no doubt, from the general language of the decision, and the previous rulings of the learned Justice, that he means by the term, the date of its consummation, the date of the patent."

Le Roy vs. Carroll, 3 Saw. Rep. 66.
See also Redfield vs. Parks, 132 U. S. 239.

It is just as necessary for persons claiming lands in New Mexico under Spanish or Mexican grants, to present their claims for investigation and determination to the tribunal invested by Congress with the power to pass upon the same, as it was in California. It can make no difference that the tribunals provided were of a different character. Congress and the officers of the Land Department are the final arbiters as to such claims in New Mexico while a different tribunal was provided for California, but the final act on the part of the government in each of the cases. is the issuing of the patent, and we do not believe that any good reason can be assigned for setting the statute of limitations in motion as to claims in New Mexico at an earlier date than it would run as to similar claims in California.

A copy of the patent is set out on pages 15 to 23 of the record, and it bears date May 20, 1876, and by referring to pages 41 and 55 of the record, it will be seen that Elias Brevoort, as of the date of July 11, 1884, filed his cross-bill in the suit of Farish and others vs. The New Mexico Mining Company and others, such cross-bill being the same that the appellant is now prosecuting for the purpose of ascerting his rights.

But little over eight years elapsed from the time of the issuing of the patent until the cross-bill was filed.

The appellant therefore, contends that his cause of action was not barred by the statute of limitations, and that the Supreme Court erred in deciding that it was barred.

EFFECT OF PATENT.

The patent was issued to the New Mexico Mining Company without authority of law. The act of confirmation did not name any person as a confirmee, but contains this clause.

Provided: That the foregoing confirmation shall only be construed as a quit-claim or relinquishment, on the part of the United States, and shall not affect the adverse rights of any other person or persons whomsoever."

Vol. 12 U. S. Stat., p. 887.

The patent should have issued to the original grantees, and for the use of themselves, their heirs, representatives or assigns.

The rights of the parties, however, are not affected by the error of the officers in issuing the patent, for equity will regard that as done that should have been done.

This Court, in the case of White vs. Cannon, 6 Wall., 443, held that a patent issued in pursuance of a statute containing a proviso similar to the one above quoted, would be subject to the proviso, although the patent should not set forth the proviso.

It has been repeatedly held by this Court that if, by mistake of law or of fact, the officers of the government issue a patent for lands to one person, when the lands belong to another, that Courts of equity, on a proper application, will decree that the person holding the

legal title is a trustee for the true owner, and will order that a decree be entered or conveyance be made to invest the true owner with the title. The following cases support this doctrine:

Meader vs. Norton, 11 Wall., 442.

Johnson vs. Towsley, 13 Wall., 72.

Moore vs. Robbins, 96 U. S., 530.

The New Mexico Mining Company is, therefore, a trustee of the appellant to the extent of his interest in the lands in controversy.

The appellant, therefore, respectfully submits that the said Supreme Court erred in its decision and decree in affirming the decree of the District Court, and in ordering the cross-complaint of the appellant to be dismissed, and prays that said decree of said Supreme Court may be in all things reversed and set aside.

Respectfully submitted,

THOMAS SMITH,
H. L. WARREN,
Solicitors for Appellant.

DEC 4 1895
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1895

No. 89.

CHARLES H. GILDERSLEEVE, COMPLAINANT AND APPELLANT,

vs.

THE NEW MEXICO MINING COMPANY, DEFENDANT AND APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

SUPPLEMENTAL BRIEF FOR APPELLANT.

HENRY L. WARREN,
THOMAS SMITH,
Solicitors for Appellant.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895

No. 89.

CHARLES H. GILDERSLEEVE, COMPLAINANT AND APPELLANT,

vs.

THE NEW MEXICO MINING COMPANY, DEFENDANT AND APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

SUPPLEMENTAL BRIEF FOR APPELLANT.

I.

From the record and opposing briefs it is apparent that the determination of the questions presented in reference to the validity of the will of José Francisco Ortiz, and its admissibility in evidence as a muniment of title in the New Mexico district court in the first instance, without previous probate or protocolization, depends upon the decision as to what law or statute was in force and applicable to the facts.

"The power to dispose of property by will is neither a natural nor a constitutional right, but depends wholly upon the statute, and may be conferred, taken away, or limited, and regulated in whole or in part by the legislature."

Breton *vs.* Fox, 100 Mass., 234.

The execution and probate of wills are wholly the creatures of statute law.

3 Jarman on Wills, 721, n. 1.

The facts certified to this Court which are material upon the questions are the following:

VII. That on the 15th day of August, 1841, the said José Francisco Ortiz and his wife, Maria Ynez Montoya, appeared before J. Albino Chacon, constitutional alcalde and by operation of law a judge of the first instance of the department of New Mexico, at Sante Fé, its capitol, and Francisco Ortiz y Baca and Joaquin Yomohano were attending witnesses, who were both personally known to the said alcalde, J. Albino Chacon, as he certified, and that they made and executed a mutual will, by which they attempted to make the one surviving the other the devisee or heir-at-law to all the property of the deceased, both real and personal, of every kind whatsoever, they having no children or forced heirs then living; that they, the said José Francisco Ortiz and Maria Ynez Montoya, signed and executed the said will before the said alcalde, Chacon, and his attending witnesses; that the signature of José Francisco Ortiz set to the said will is his true and genuine signature, and that the signature of the said Maria Ynez Montoya set to the said will is her true and genuine signature, some one having written her name for her and she having set her cross thereto, as was customary for people not knowing how to write to do at that time; that said Maria Ynez Montoya did not know how to and was unable to write; that the signature of the said J. Albino Chacon set to said will is his true and genuine signature; that Francisco Baca y Ortiz and Joaquin Yomo-

hano witnessed the signatures of José Francisco Ortiz and his wife, and that the signature of the said Francisco Baca y Ortiz set to said will is his true and genuine signature; that the signature of Joaquin Yomohano set to said will is his true and genuine signature.

VIII. That at the time said will was made the said José Francisco Ortiz was a soldier in actual service in the Mexican army, with the rank of lieutenant, acting as captain; that afterwards he was appointed to a captaincy and acted as such until about the month of August, 1846, at the time the American troops under General Kearney captured Santa Fé; that at this time José Francisco Ortiz severed his connection with the Mexican army and became a civilian and remained as such until his death, July 22, 1848.

IX. That the said mutual will was in the possession of Maraquita Montoya, wife of said José Francisco Ortiz, until the latter part of the year 1855, when Francisca Hinojos, a witness on behalf of the respondents in this cause and niece of said Maraquita Montoya, came to Santa Fé to live with her aunt; that said Maraquita requested witness to look through a package of papers belonging to said Maraquita for a mutual last will between herself and her late husband; that the said Francisca Hinojos did look through the papers and found among them the original will (a copy and translation of which is introduced herein by respondents and marked Exhibit B. N., B. L.); that the original will was shown the witness Francisca Hinojos, and she identified it as being the same paper she found in 1855 among the papers of her aunt, Maraquita Montoya, wrapped up in a small bag; that witness read said paper to said Maraquita and she said it was the one, and requested witness to take particular care of it; that the said will remained in the possession of Francisca Hinojos from that time to the year 1873; that in the year 1874 said Francisca Hinojos delivered the said will to Antonio Ortiz y Salazar, a witness for respondents in this case, to be by him delivered to Stephen B. Elkins;

that said Elkins was then the legal representative of the New Mexico Mining Company; that said Elkins paid said Francisca Hinojos one thousand dollars for said will as a consideration; that said Francisca Hinojos inherited all the property of her aunt, Maraquita Montoya; that said Francisca Hinojos lived with her aunt Maraquita from 1855 to the time of her death, in December, 1870.

X. That said will was never proved or admitted to probate as the last will of either José Francisco Ortiz, his wife, Ynez Montoya, or any one else.

The findings numbered XI and XII (pp. 174 and 175, Record) are important only as indicating the contemporaneous construction placed upon the instrument by the interested parties, which is further shown by special finding of the court.

XXIV. Clause eleven, p. 183, Record:

"That there is no evidence to show that said Maria Ynez Montoya ever claimed the property in controversy as an inheritance from her said husband through, under, or by virtue of said mutual will except in deed of conveyance to John Greiner, where it recites that 'she is the widow and sole heir of José Francisco Ortiz.'"

In New Mexico, where the will in question was made and where the testator died, the provisional government established under the authority of the United States and the laws promulgated under it on September 22, 1846 (Compiled Laws of New Mexico of 1884, pp. 84–129), and known as the Kearney Code, have been authoritatively and finally adjudicated as legal and valid in all respects, and as supplanting, so far as conflicting, the former Mexican government and laws, and as remaining in force until subsequently repealed by the legislature created by the organic act passed by Congress on September 9, 1850.

Leitensdorfer *vs.* Webb, I N. M. Rep., 43.
Same case, 20 Howd., U. S., 176.
Bent *vs.* Thompson (N. M.), 23 Pac. Rep., 236.
Same case, 138 U. S., 114.

The Kearney Code, as we have seen (Appellant's Brief, p. 17), continued in force the existing laws contained in the treaties of Pedro Murillo Velarde so far as in conformity with the Constitution and laws of the United States, and in addition thereto provided for probate of wills and letters testamentary (Comp. Laws N. M., pp. 84 and 86), and established a court, called the "prefect's court," in each county, with "exclusive original jurisdiction in all cases relating to the probate of last wills and testaments" (sec. 21, p. 95, Comp. Laws of N. M. of 1884), with the right of appeal from its judgments (sec. 22).

It will be observed that these laws were in force at the time of Ortiz's death, in 1848, and at that time he had ceased to be a Mexican soldier and was then residing in and subject to the laws in force in New Mexico. With the exception that in the territorial government established by Congress, "probate courts" were substituted for "prefect's courts" (sec. 10, p. 48, Comp. Laws N. M.), and the Legislative Assembly made various amendments (Appellant's Brief, p. 24). These requirements of the Kearney Code have ever since its promulgation been in force in New Mexico, and under it the courts have expressly held that "the probate courts of this Territory are courts of record, so far as the probating of wills is concerned, and their jurisdiction is *original and exclusive* in the first instance."

Bent *vs.* Thompson, 23 Pac. Rep., 239.
Same case, 138 U. S., 114.

That the laws of Velarde required a "nuncupative will," such as this, to be proven before it became operative (Bent *vs.* Thompson, *supra*, p. 237); that the laws of New Mexico have always required it, and that the district court and supreme court of New Mexico erred in admitting the will in evidence without such probate, is sustained by all the authorities upon the subject.

We submit that the authorities themselves cited by appellee in his brief sustain the contention of appellant.

In Tevis *vs.* Pitcher, 10 Cal., 477, it is said: "The will and codicil took effect by the death of the testator previous to the establishment of the present State government, and the several statutes relating to wills do not apply to wills *executed* previous to their passage."

In Grimes Estate *vs.* Norris, 6 Cal., 624, the court says: "It will be observed that the will became *executed* by the death of the testator in 1848, prior to the passage of the statue of wills or the adoption of the State constitution," and it is expressly held that the laws in force at the date of the death of the testator govern the question of the validity and probate of a will, which was affirmed by this Court in Adams *vs.* Norris, 23 Howd. (U. S.), pp. 362 and 363.

In Castro *vs.* Castro, 6 Cal., 159, the testator had died in in 1831, while California was under the Mexican government.

In Panaud *vs.* Jones, 1 Cal., at page 512, the testator died in 1846, and, of course, before any State or other legislation upon the subject, and the same rule was applied.

That a will must be executed and proven in conformity with the laws in force at the time of the death of the testator and not in accordance with those existing when it is made or signed, we think is beyond controversy. (Appellant's Brief, p. 17.)

The inequity of permitting a title to be asserted under an alleged will, of which there is no record or means of knowledge, many years after the death of the testator, as against an innocent purchaser for value and in good faith from the legal heirs of the deceased, is well exemplified by the case at bar, and the want of jurisdiction of the district court in admitting the will without probate seems beyond dispute.

II.

The deed from Greiner to Whittlesy and others, although made in 1854, was not placed on record till June 21, 1873, *after* Brevoort, the grantor of appellant, had purchased from the collateral heirs of Ortiz and placed his deeds on record. (Finding XII.)

So, also, the will was not in the custody or possession of the persons claiming to be in possession of the grant from 1853 until 1874. For 21 years it was in the hands of strangers, when it was delivered to Stephen B. Elkins, attorney for appellee, a full year after Brevoort, the appellant's grantor, had purchased from the collateral heirs and placed his deeds on record.

It was not until after 1874, when Mr. Elkins purchased this will, that the appellee set up any claim under or by virtue of it. Such claim is an apparent afterthought. The existence of the will was not known to it until 1874. It is quite clear that neither Greiner nor his *cestui que trust.*, Whittlesy *et al.*, knew of its existence, for Joab Houghton, in his testimony before the surveyor general in 1860 (see appellee's exhibits, Record, p. 13), states that he was the attorney for Greiner in his purchase from the widow of Ortiz; that he examined the documents in her possession to ascertain the validity of her title; that another paper accompanied the documents, it being a deed from Cano to Ortiz. Nothing whatever is said about any will. If any such document had existed or been known at that time mention would certainly have been made of such an important instrument. Taking this in connection with the representation of the appellee to the surveyor general of New Mexico in 1860 (R., p. 146), that said property was *inherited* by the wife of Ortiz, who deeded the same to John Greiner, &c., it is quite clear that the will was not known to any of the parties claiming the grant.

The will in question, therefore, does not come within the designation of an ancient document conveying real estate.

Meegan *vs.* Boyle, 19 How., 149.

Jackson *vs.* Blanohan, 3 John., N. Y., 292.

The Kearney Code of 1846, under the head of "Register of Lands," Ex. Doc. No. 60, page 220, provides, among other things:

"Every person claiming land in this Territory by virtue of any Spanish or Mexican grant may deliver to the register of lands a notice in writing, stating the nature and extent of his claim, and shall also at the same time deliver to the register of lands, for the purpose of being recorded, the grant, order of survey, deed of conveyance, or other written evidence of his claims, and the same shall be recorded by the register, for which the party shall pay him twelve and one-half cents per hundred words contained in such written evidence of the claims."

"SEC. 6. When there is no written evidence of claim the claimant may take evidence in writing before some officer having authority to administer oaths, showing the nature and extent of his claim, how much of the land claimed has been actually cultivated and inhabited by himself, and those under whom he claims and for what length of time, and also to any grant, deed, or conveyance relating to said land having existed or any record thereof ever having been made, and as to the loss or destruction of the same, and how and when such loss or destruction happened. If any person shall neglect to deliver such evidence and notice of his claim as presented in this and the preceding section within five years from the first day of next January *such claim shall be void.*"

NOTE.—No volume of the original Kearney Code can be found in any of the libraries in Washington. A true copy, however, is found in Ex. Doc. No. 60, page 220, President's message on the Mexican war, 1st sess., 30th Cong.

As this law was in force in 1848, when Ortiz died, it was his widow's duty, if she claimed any title to lands under it,

to have proved the will and made it a matter of record, else as a conveyance it became void.

IN DISCUSSING THE EFFECT OF THE CONFIRMATORY ACT AND THE STATUTE OF LIMITATIONS THE APPELLEE INSISTS ON *characterizing the act* AS ONE "CONFIRMING ITS TITLE," and that the statute of limitations begin to run from that date or the date of the subsequent survey, in *August*, 1861. This is based entirely on appellee's theory that the grant was a perfect one and confirmed to claimants. A brief history of the grant from its inception to the date of the bringing of this suit and appellee's connection therewith may be instructive, it being assumed that this Court will look only into the original pleadings and exhibits, parts thereof, and the findings of fact certified by the territorial supreme court.

The appellee's answers to the various pleadings refer to translations of the original papers which it files and asks to be made a part of its answer. Record, page 24, and all the answers of appellee.

On page 147 of Record is found a translation of the original registration by Ortiz and Cano of "a new vein." This is dated November 15, 1833. On the following November 29, 1833, the constitutional alcalde gives instruction, in compliance with the mining ordinance, as to how the mine shall be worked, "in order that he may proceed to give them the possession and title prescribed by said article." On the 16th of December, 1833, Ortiz and Cano inform the constitutional alcalde that they have complied with his decree of the 29th ultimo. On the 18th of December the constitutional alcalde appointed an expert to give the possession according to the mining ordinance. On the same day the alcalde and witnesses, the expert being present, caused the expert "to examine and identify the mine," of which Ortiz and Cano were ready to take possession; whereupon the alcalde and witnesses put them in possession of the mine.

This having been done, Ortiz and Cano then asked to be

invested "with the privileges of necessary water supplies and issues for the working of machinery and the pasturage of cattle," &c. The alcalde thereupon, considering they are entitled to them by virtue of the mining ordinances, grants them as water supplies to work their machinery certain water supplies "which may be included within the limits of the commons in the direction of the east," and "as pasture commons two leagues for each of the four cardinal points of the mine."

It will be observed that this is not an ordinary grant under the colonization laws of Mexico, but a mining grant, accompanied with the right to the use of commons, as provided in the ordinances referred to in the granting order.

Nothing more appears by the record to have been done in this matter before any officers of the governments of the Republic of Mexico or the United States until August 27, 1855, when A. Rencher and others (see Record, pages 139, 140), claiming to own the grant, submitted for the consideration of the surveyor general of New Mexico a synopsis of it, in which they gave the names of the original claimants, present claimants, description of the land, area, and nature of the claim. It was thereby claimed that the area of the grant was 92,160 acres.

November 8, 1860 (Record, page 145) appellee herein, The New Mexico Mining Company, by John S. Wells, its attorney, for the first time appears on the record to claim the grant. It represents by this petition (Record, page 146) that Ortiz had purchased Cano's interest and took possession of the land and mines. It *misrepresented* the facts by stating that Ortiz left no collateral relatives, and that the property was *inherited* by his wife. It was by this misrepresentation the appellee herein first obtained a status in the case before the surveyor general of New Mexico and subsequently procured the patent to be issued to it.

On November 9, 1860, testimony was taken before the surveyor general, and on November 24, 1860, that officer ap-

proved the grant and recommended its final confirmation to the Congress of the United States (Record, page 137). It will be noted that the surveyor general *did not* recommend the confirmation of the grant to the appellee's grantors, and in March, 1861, the grant was confirmed by Congress as recommended for confirmation by the surveyor general.

The decision of the surveyor general as to title was merely extraministerial; he is not a judicial officer.

Pinkerton *vs.* Ledeoux, 129 U. S., 346.

It certainly will not be seriously contended that up to this date the grant was a perfect one. A survey was made by Deputy Surveyor Means in August, 1861. This survey does not appear to have ever been approved till the issuance of the patent in 1876. Nothing further appears to have been done from the latter date until June, 1875, when the Commissioner of the General Land Office set aside the survey.

Attention is now called to the admission in the pleadings of the appellee that its title and the grant was an inchoate and not a perfect one. On page 25 of Record the appellee, in its answer to the original bill, admits that the title of Ortiz and Cano was "an inchoate and equitable estate," and that a "release, relinquishment, or quitclaim (meaning a patent) was necessary and requisite to vest in Cano and Ortiz and their legal representatives a full and absolute title to any part or portion of the Santa Rosalia mine or said four leagues square of land adjacent thereto;" and on page 29 of Record the appellee claims the act of confirmation operated "as a new and enlarged grant," and yet claims that the boundaries of the grant were fixed and in no manner uncertain, "even without an official survey." It also admits on page 30 of Record, "that 259 acres, more or less, of the land in question were included in the patent to the Cañon del Agua grant and not included in the patent for the land in question."

On page 58 of Record the appellee, in its answer to the

cross-bill of appellant's grantor, denies the "grant was a perfect and complete grant, so as to vest the legal title to said mine and premises in said grantees," &c.; and, on page 59, "that the acts and doings of Ortiz and Cano and the said alcalde in the premises did vest in said Ortiz and Cano an inchoate title and equitable estate in said mines and lands for the purposes mentioned." On page 62 of Record appellee alleges "the act of confirmation operated as a new and enlarged grant to A. Rancher and six others, named as petitioning claimants, and to the New Mexico Mining Company as their assign, and that said confirmation conferred to and vested in said petitioners and their assigns full and absolute title in fee-simple of said tract of land and all the mines thereon."

On page 45 of Record, the bottom of the page, cross-complainant Brevoort, appellant's grantor, states that "in the year 1875 the said Commissioner (meaning Commissioner of the General Land Office) duly approved said survey," and on page 62 of Record, at the bottom of the page, the appellee "admits that the said tract of land was surveyed at the time as stated in said cross-bill, and that the same was approved by the Commissioner of the General Land Office, as therein stated." Here is a direct admission on the part of appellee that the survey made by Deputy Surveyor Means in August, 1861, was not approved by the Commissioner of the General Land Office until 1875 (this date is probably a typographical error; it should be 1876, when the patent issued). On page 114 of Record the appellee again "denies the grant was a perfect and complete grant, so as to vest the legal title in the grantees, or had any other force and effect than as in said answer thereinafter stated, and on page 115 of Record "that said acts and doings of the said Ortiz and Cano and the said alcalde in the premises did vest in the said Ortiz and Cano an inchoate title and equitable estate in said mines and lands for the purposes mentioned." On page 119 of Record appellee again alleges

"that the act of confirmation operated as a new and enlarged grant to A. Rencher and his associates," &c., and admits that the survey was approved, as stated in appellant's cross-bill, in 1875 (1876).

Finding of facts as to conflict of surveys. XVIII finds that there was a conflict of about 11,000 acres between the Ortiz grant and the Juan Lopez grant; that the latter was examined, approved, and recommended for confirmatian by the surveyor general of New Mexico on the 29th of November, 1872.

With the facts confronting the Commissioner of the General Land Office in 1875 (1876) that the claimants to the Ortiz grant claimed 92,160 acres, while the survey of Deputy Surveyor Means for that grant was for 69,358 acres, and a dispute with the Ramirez or Cañon del Agua grant over 259 acres, and another dispute with the Juan Lopez grant of some 11,000 acres, is it at all strange that upon an examination of these disputes and conflicts as to surveys and boundaries the Commissioner set aside and disapproved the survey and directed the surveyor general of New Mexico to cause a new survey of the grant to be made? (Finding XIII.)

From this it will appear that up to May, 1876, the date of the final issuance of the patent, the matter of survey, area, and boundaries of the Ortiz grant was *sub judice*, unsettled and undetermined. This brings it clearly within the designation of an imperfect grant. The act of confirmation did not make it perfect. A survey and issuance of patent were necessary.

Stoneroad *vs.* Stoneroad, 158 U. S., 240.

The statute of limitations is a statute of repose, but any one invoking it must bring himself clearly within its provisions as a prerequisite to its barring an action of this kind. In New Mexico the party asserting it must have "had possession for ten years of any lands, tenements, or hereditaments which have been granted by the governments of Spain, Mexico, or the United States, or by what-

soever authority empowered by said governments to make grants to lands, holding or claiming the same by virtue of a *deed or deeds of conveyance, devise, grant, or other assurance purporting to convey an estate in fee-simple,*" &c.

Sec. 1880, Compiled Laws New Mexico, 1884.

The territorial supreme court finds as a matter of *law* that appellant's action is barred by the above statute, but it finds no *fact,* as required by act of Congress, governing its finding to this Court on that point. It does not find as a fact that appellee claimed under any "*devise* or *deed* or *deeds* of conveyance purporting to convey an estate in fee-simple," and there is nothing in the record to support any such claim in this Court.

The appellee quotes quite extensively from the opinion of this Court in *Probst* vs. *Presbyterian Church* (129 U. S., 182). This opinion is based on another section of the statute of New Mexico not applicable to this case.

Laches.

Appellee speaks in its brief about laches on the part of appellant. We think it a sufficient answer to this suggestion that that question was not raised in the court below, and no such fact is certified by the Territorial court in its findings to this Court.

Even if this Court could consider it, an examination of the orders of the trial court permitting this appellee and its grantor, Brevoort, to intervene, answer, and file cross-bills would develop the fact that the grantor's rights in the premises are preserved the same as though he had been made a party in the first instance in 1883.

Record, pages 41, 73, 90, 91, 92.

All of which is respectfully submitted.

Henry L. Warren,
Thomas Smith,
Solicitors for Appellant.

Office Supreme Court, U. S.
FILED.
NOV 27 1895
JAMES H. MCKENNEY,
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1895.

No. 89.

CHARLES H. GILDERSLEEVE,
Appellant,

vs.

THE NEW MEXICO MINING COMPANY,
Appellee.

BRIEF FOR APPELLEE.

JOS. LAROCQUE,
Of Counsel for Appellee.

Supreme Court of the United States,

OCTOBER TERM, 1895.

No. 89.

CHARLES H. GILDERSLEEVE,
Appellant,

vs.

THE NEW MEXICO MINING COMPANY,
Appellee.

BRIEF FOR APPELLEE.

This is an appeal taken by the plaintiff below from the Supreme Court of the Territory of New Mexico.

The judgment from which the appeal is taken appears at page 163 of the Record. The litigation originated in the District Court for the First Judicial District of the Territory of New Mexico, the judgment of which last mentioned tribunal appears at page 160 of the Record. The complainant carried the case to the Supreme Court of the Territory by writ of error.

The subject matter of the litigation is the title to certain mines and lands situate in the Territory of New Mexico, commonly known as the Ortiz Mine Grant, the validity of which was confirmed by the Congress of the United States on March 1, 1861, under the designation of

"Private Land Claim in the Territory of New Mexico, No. 43," by an act entitled "An Act to Confirm a Certain Private Land Claim in the Territory of New Mexico" (Chap. LXVI., Sess. 2, 36th Congress).

The litigation out of which the present appeal arises was inaugurated by a bill in equity exhibited in the District Court for the First Judicial District of the Territory of New Mexico, by one Edward T. Farish and others against the present appellee and others (Record, p. 1).

The appellant was not an original party to that bill. He was permitted to intervene by an order of the District Court made on the 2nd day of July, 1886 (Record, p. 73); and to file a petition of intervention, which appears at page 74; and afterwards on the 8th July, 1886, the appellant filed a petition for leave to file a cross-bill, which application was granted by an order made on the 15th December, 1886 (Record, p. 90). Under this order the appellant was permitted to file and did file an amended cross-bill (Record, p. 96). To this amended cross-bill the appellee, on the 5th of March, 1887, filed an answer (Record, p. 111), and on the same date also filed separate pleas (Record, p. 128).

The first three pleas presented an issue under the Statute of Limitations of the Territory of New Mexico. The fourth and fifth pleas presented an issue of *res adjudicata*. The appellant filed a replication to the answer (p. 131), and also to the fourth and fifth pleas (p. 132), and moved to strike out the first three of said pleas. The District Court decided in favor of the appellant upon the pleas as to a former adjudication (Record, p. 134), and denied the application to strike out the first three pleas setting up the Statute of Limitation (p. 133).

The original bill in the case of Farish and others was dismissed upon the merits by a decree entered on the 6th October, 1887 (Record, p. 135). This decree contained a proviso that it should not prejudice any rights that the present appellant might have acquired as intervenor in that cause or by reason of his cross-bill therein.

The transcript of the record as returned to this Court by the Supreme Court of the Territory of New Mexico contains not the entire record of the District Court filed

in the Supreme Court of the Territory, *but only so much thereof as the appellant deems necessary for the proper review of said cause in this Court* (p. 1). While some of the testimony taken below is included in the transcript, the greater part of such testimony is omitted and in its place are returned certain findings of the Supreme Court of the Territory commencing at page 167.

FACTS.

The following facts appear from the findings filed by the Court below:

The property in question known as the Ortiz Mine Grant, and also designated in the Department of Lands at Washington and in the Surveyor General's office at Santa Fé, New Mexico, as Private Land Claim No. 43, was originally granted in the year 1833 by the Mexican government, to which it belonged, being public land, to José Francisco Ortiz, the person through whom both parties claim title, and Ignacio Cano; said grant was made with all the formalities required by law, and thereupon the said José Francisco Ortiz and Ignacio Cano formally took possession of the said mine and grant, and on the 29th day of December, 1853, the documents relating to said registration and grant were recorded in the office of the Probate Clerk of Santa Fé County in the Territory of New Mexico (Findings I. and II., pp. 168–169).

Prior to the breaking out of hostilities which resulted in the session of New Mexico to the United States under the treaty of February 2, 1848, Ignacio Cano sold and conveyed all his right, title and interest in the said mine and grant for a valuable consideration to José Francisco Ortiz, who then was in possession and thereafter remained in continuous and uninterrupted possession of the premises in question up to the time of his death (Finding III., p. 169).

On the 22d July, 1848, the said José Francisco Ortiz died at Santa Fé, County of Santa Fé, Territory of New Mexico, without heirs, either ascendant or descendant. There survived him various children of a deceased brother and a sister, who subsequently died leaving various children her surviving (Finding IV., p. 169).

José Francisco Ortiz was married prior to the year 1841; his wife's name was Maria Ynez Montoya. She was commonly known as Maraquita Montoya, and she died December, 1870 (Finding VI., p. 172).

On the 15th August, 1841, José Francisco Ortiz and his wife, Maria Ynez Montoya, appeared before J. Albino Chacon, Constitutional Alcalde, and by operation of law a Judge of the First Instance of the Department of New Mexico at Santa Fé, its capital, with two attending witnesses, both personally known to the Alcalde, and in the presence of the Alcalde and the two attending witnesses made and executed a mutual will, a copy of which is set out in the opinion of the Supreme Court (p. 186), and which was as follows:

"[Third stamp (stamp) two reals, for the years of one thousand eight hundred and forty, and one thousand eight hundred and forty-two.]

"At the City of Santa Fé, capital of the Department of New Mexico, on the fifteenth day of the month of August, of one thousand eight hundred and forty-one, before me, the citizen Albino Chacon, constitutional Alcade of the same, and by operation of law, Judge of the first instance, those of my attendance being present, with whom I act by special authority, appeared Don José Francisco Ortiz, a resident of the Real de Oro, and his living wife, Doña Maria Ines Montoya, both of whom I certify I know; and they together stated that whereas, God has not been pleased to give them a child or forced heir living, they agree with each other that the one who shall survive the death of the other shall be the sole heir to everything that may be recognized as their property, in live stock, real estate, chattels, or in any

" other manner, without any relative or either of
" them preventing it, through any privileged right
" that he may allege; but in case that it should so
" happen, and that it should be attempted by any
" of them to institute suit against the surviving
" party, the testators from this time request the
" national justices, and in particular those who
" may have cognizance of this matter, that they be
" no-heard either in or out of Court, but rather
" they give authority to the judges in order that by
" all the rigor of law they may force and compel
" them to what is stipulated by this document, and
" to the guaranty thereof, as fully as if it were in
" definitive sentence pronounced in adjudicated
" cause, acquiesced in by them and not appealed
" from.

" In witness and guaranty whereof they thus re-
" quest me to authenticate it, which I do according
" to the provisions of law, with my attending wit-
" nesses, to which I certify.

" JOSÉ FRANCO. ORTIZ,
" MARIA INES MONTOYA."

" JOSÉ ALBINO CHACON.
" (De Assa.): JOAQUIN YOMOJANO.
" (De Assa.): FRANCO. BACA Y. ORTIZ."

This will was signed and executed by both parties before the Alcalde and the attending witnesses. All the signatures to this document are found to be true and genuine (Finding VII., p. 172).

At the time this will was made the said José Francisco Ortiz was a soldier in active service in the Mexican Army, with the rank of lieutenant, acting as captain. He afterwards was appointed to a captaincy and acted as such until about the month of August, 1846, at the time the American troops under General Kearny captured Sante Fé. At this time Ortiz severed his connection with the Mexican Army, becoming a civilian and remaining as such until his death, which occurred July 22, 1848 (Finding VIII., p. 173).

This mutual will remained in the possession of Maraquita Montoya, the wife of the said José Francisco Ortiz, until the latter part of the year 1855, when Francisca

Hinojos, niece of the said Maraquita, went to Santa Fé to live with her aunt. The said Maraquita requested her niece to look through a package of papers belonging to her for this will, and the said Francisca found the original will among the papers in the possession of her aunt, who requested witness to take particular care of it.

The said Francisca lived with her aunt from 1855 to the time of her death in December, 1870, and inherited all the property of her said aunt. The original will was delivered by her to a representative of the appellee in 1874, for a consideration of $1,000 paid to her (Finding IX., p. 173).

This will was never formally proved or admitted to probate (Finding X., p. 173).

On the death of José Francisco Ortiz his wife took possession of the property in question and continuously held possession of the same until the 26th day of December, 1853, when she conveyed the said lands and property to John Greiner, by deed of conveyance executed by her on the day last mentioned, and acknowledged by her on the same day, which deed was recorded in the office of the Probate Clerk of Santa Fé County on the 29th day of December, 1853 (Finding XI., p. 174).

On the 19th August, 1854, the said John Greiner, with his wife, conveyed the said lands and premises in question to Elisha Whittelsey and others and to their heirs and assigns forever in certain proportions.

On the 18th August, 1854, the then owners of the said lands and premises under the conveyance from John Greiner and wife, executed articles of association under the name of the New Mexico Mining Company, and on the 1st of February, 1858, by an act of the Legislature of New Mexico, the New Mexico Mining Company was incorporated, and the lands and premises in controversy were then conveyed to the New Mexico Mining Company, the present appellee (Finding XII., p. 174).

On the 8th November, 1860, the grantees under the Greiner deed, Whittelsey and associates, petitioned the

then Surveyor-General of the Territory, A. P. Wilbar, to examine their title to the grant, property and lands in question, and approve the same, and recommend its final confirmation to the Congress of the United States. On the 24th November, 1860, the said Surveyor-General of the Territory rendered his decision approving the title, and by an act of the Congress of the United States, entitled "An Act to confirm a certain land claim in the Territory of New Mexico," approved March 1, 1861, the Congress of the United States did confirm the grants and lands in question in this suit, the same being designated as "Private land claim No. 43." On the 14th day of August, 1861, the survey of the said Ortiz Mining Grant was completed by Thomas Means, United States Deputy Surveyor, by the authority and under the direction of the then Surveyor-General of the United States for the Territory, and said Deputy United States Surveyor certified that the grant contained 69,458.33 acres of land.

Subsequently and in or about the month of June, 1875, the Commissioner of the Land Office, an application being then pending for a patent, rendered an opinion setting aside and disapproving the survey which had been made and directing a new survey. This decision of the Commissioner was reversed by the Secretary of the Interior on April 22, 1876, and the original survey was approved and direction given that a patent should issue thereupon to the appellee. On May 20, 1876, a patent for the property in question signed by U. S. Grant, then President of the United States, was issued to the appellee and to its successors and assigns by the United States of America for the lands and premises therein described containing 69,458.33 acres, less 259 acres which had been found to be in conflict with another grant (Finding XIII., p. 176).

NOTE.—The decision of the Surveyor-General in favor of the title in the grantees under the deed from Greiner and wife appears at page 136. The Letters Patent referred to appear in the Record, commencing at page 15.

During the month of May, 1873, one Elias Brevoort obtained conveyances from the children of the deceased

brother and sister of José Francisco Ortiz of their several interests in the property in question. On the 30th of June, 1880, the said Brevoort conveyed all his right, title and interest in and to an undivided one-half interest in the said property and lands to the appellant and one John H. Knaebel, in pursuance of a certain contract of June 30, 1880, between the said Brevoort and the said Gildersleeve and Knaebel. This contract appears as Exhibit 1, p. 83. The consideration, it will be observed, was the undertaking of the appellant and his associate Knaebel to prosecute an action, and to advance the disbursements necessary to that end.

On the 7th July, 1886, the said Knaebel reconveyed his right in and to the property and lands in question to the said Elias Brevoort, and on the 8th July, 1886, the said Elias Brevoort conveyed all his right, title and interest to the New Mexico Mining Company (Finding V., p. 170).

On January 20, 1880, the New Mexico Mining Company conveyed the said property in question to Stephen B. Elkins and Jerome B. Chaffee, and on the 14th April, 1884, the said Elkins and Chaffee reconveyed the property embraced in the said original grant with certain reservations to the New Mexico Mining Company (Finding XIV., p. 177).

Possession.

The facts found as to the possession of the property are as follows:

José Francisco Ortiz held possession from the date of the grant to him and Ignacio Cano up to the time of his death, to wit, July 22, 1848; after his death, his surviving widow took and held possession from that time up to the 20th December, 1853, when she sold, transferred and delivered possession to John Greiner. Greiner took possession of the property in question on the 26th December, 1853, and he and his assigns held actual, open and notorious posses-

sion of said property from that day until the date of filing appellant's cross bill in this suit. Such possession was held by employing an agent or agents to live on the property at the Village of Dolores, near the Santa Rosalia mine, and by making large and extensive improvements on the property, building a large stamp mill, and many other acts open and notorious, indicative of ownership of the property. Such claim of ownership and possession was made by the appellee and all its grantors under and by virtue of the grant made by the Mexican Government to José Francisco Oritz and Ignacio Cano on the 10th day of December, 1833, and through divers mesne conveyances to the time of filing the cross-bill in this suit (Finding XVI., p. 178).

Neither the heirs of José Ignacio Ortiz nor Maria de la Luz Ortiz de Sanchez, the brother and sister of José Francisco Ortiz, were ever in possession, either active or constructive, at the time they made deeds of conveyance of their alleged interest in the Ortiz Mine Grant, claiming to be collateral heirs of José Francisco Ortiz, and neither said collateral heirs nor their direct ascendants ever were at any time in possession of said property, either active or constructive. The said Elias Brevoort, under whom the appellant claims title, had notice of the fact that none of his grantors were in possession, and that the appellee, the New Mexico Mining Company, was then in actual possession of a part of the grant, claiming title to all of it. At the time the deed was made from Brevoort to Gildersleeve and Knaebel the New Mexico Mining Company was in possession, either actual or constructive, and Gildersleeve and Knaebel had notice of the fact that Brevoort was not in possession, and that the New Mexico Mining Company was in possession.

The deed of conveyance from Brevoort to Gildersleeve and Knaebel for one undivided half part of the grant was given in consideration of money advanced from the appellant to said Brevoort for the maintenance of the suit of said Brevoort, and for legal services of said Gildersleeve and Knaebel in filing the bill in chancery and investigating the title and prosecuting it to final conclusion (Finding XXII., p. 182).

Questions to be Considered.

Two principal questions arise for the consideration of this Court upon the present appeal.

1. *As to the validity of the will of José Francisco Ortiz, and its sufficiency to vest the title to the property in controversy in his widow.*

2. *Was the plaintiff's suit properly dismissed as barred by the Statute of Limitations of the Territory of New Mexico?*

It is proposed to consider these two questions in the order stated; and also to urge that without reference to any other ground.

3. *The judgment appealed from should be affirmed on account of the laches of the appellant.*

POINTS.

I.

The will of the said José Francisco Ortiz was a valid will, legally and properly executed, and was sufficient to vest and did vest the title to the property in controversy in Maraquita Montoya, widow of the said José Francisco Ortiz.

The facts in relation to the execution of this will are set forth in detail in finding VII. of the findings of fact (p. 172).

The husband and wife appeared before the Alcalde accompanied by two witnesses and signed and executed the

said will in the presence of the said Alcalde, and the two additional witnesses, and the said Alcalde and the two other witnesses added their signatures as witnesses of its execution. At the time of the said execution of said will the said José Francisco Ortiz was a soldier in active service in the Mexican Army, with the rank of lieutenant, acting as captain.

1. The will was properly executed and valid under the existing laws and customs of the Territory of New Mexico at the time when it was executed.

The Kearney Code of Laws, adopted on the acquisition of the Territory of New Mexico by the arms of the United States, contains the following proviso:

"SECTION 1. The laws *heretofore in force* concerning "descents, distributions, wills and testaments as contained "in the treatise on these subjects, written by Pedro Mu- "rillo Velarde, shall remain in force so far as they are in "conformity with the Constitution of the United States "and the State laws in force for the time being."

Compiled Laws of New Mexico (1884), p. 84.

In his work "Practica de Testamentos," the work recognized as authority on the subject of the existing laws of New Mexico at the time of its conquest by the United States, Velarde describes two kinds of wills as authorized under the laws of Mexico, viz.:

1. The written, commonly called "sealed" will, for the due execution of which certain formalities are requisite, and

2. The nuncupative, otherwise called "open" will, the requisites of which differ from those of the "sealed" will.

Chap. 1, p. 3.

The instrument in question in this cause is what Velarde describes as an "open" or "nuncupative" testament.

As to the witnesses required for the due execution of an

open or nuncupative will, Velarde states the rule as follows:

> "The second formality is the presence of witnesses.
> "For an open will, three, at least, are required, residing near the place where the will is made, and it should be executed before a notary public.
> "If the latter cannot be had, five witnesses should be present, residing near the place, and if they cannot be had, three will suffice" (p. 3).

It will be remembered that at the time of the commencement of the litigation more than forty years had elapsed since the execution of the will under consideration. It had been executed in 1841; the testator had died in 1848, and the devisee thereunder had occupied and held possession of the premises in question, claiming ownership thereof until December, 1853, when she conveyed the same. The will, therefore, comes under the designation of an ancient document, entitled to every reasonable presumption in favor of its validity.

It appears to have been executed in the presence of three witnesses, viz., the Alcalde and two others. The authenticity of the signatures of the parties and witnesses has been expressly found. Its custody from the death of the testator to the time of trial was traced and proved to have been where it naturally belonged, with those in possession of the premises in question claiming title thereunder.

The objection has been made that the will in question does not appear to have been executed in the presence of three witnesses; that the participation of the Alcalde in the execution of the will was in an official capacity, and not as witness, and that therefore he could not be included in the three witnesses supposed to have been required by the existing law. This question has already long ago been put at rest by the decisions of the courts. In *Tevis* v. *Pitcher*, 10 Cal., 465, the Supreme Court of California considered and disposed of this question as follows:

At page 478 Mr. Justice Field, delivering the opinion of the Court says:

"Aside from the consideration of the effect of the cus-
"tom established by the proofs in this case, the codicil
"comes up to the fullest requirements of the general
"law in the number of its witnesses. It was made in the
"presence of three. The fact that Ridley signs the in-
"strument as Sindico does not the less render him a wit-
"ness. He was present at its execution. It purports to
"have been made before him. The will in *Panaud* v.
"*Jones* (1 Cal., 504) was executed before, or rather signed
"by, the Alcalde and two witnesses, and the Court held
"that the will was valid, tested by the strict rules of the
"Mexican or Spanish law. 'Whether an *escribano*,'
"says Bennett, *J.*, in delivering the opinion of the Court,
"'may, at the same time, act in the double capacity of
"'*escribano* and witness, is a disputed point in Spanish
"'law, Coverubias holding in the affirmative (Coverubias
"'Opera, Tom. 1, p. 58, Cap. 10, § § 2, 3) and Sala
"'the negative (2 Sala Mej., 111, § 13). I see noth-
"'ing inconsistent in his signing as a witness, and,
"'where there is a diversity of opinion among writers of
"'approved authority, we ought to adopt that opinion
"'which is most in unison with the former condition of
"'things in this country, and which will probably con-
"'duce the best to uphold and carry into execution the
"'intention of the parties. There was then, I think,
"'nothing in the fact of Pedro Chivallo's being Alcalde,
"'which disqualified him from being a witness.'"

NOTE.—The will in the case above referred to, had written on it, below the signature of the testator, the following attestation:

"Before me, in the absence of the two Alcades.
"Roberto T. Ridley, *Sindico*.
"Witness: Nathan Spear, Guillermo Hinckley."

2. Even if under a strict construction of the ancient Spanish law it should be considered that three witnesses in addition to a notary had originally been necessary to give validity to the execution, the fact that that law had

been modified by custom and usage extending over a long period of years and of almost universal practice—a modification recognized by the courts—according to which custom nuncupative or open wills executed in the presence of two witnesses and an Alcalde were held to be valid, appears in many reported cases.

In the case of *Tevis* v. *Pitcher*, 10 Cal., 465, the custom referred to is expressly recognized.

With reference to this matter Mr. Justice Field says (pp. 477, 478):

> " It was valid if made in the presence of three " witnesses, and even this number was not abso- " lutely essential under the custom existing in " California and which obtained the force of " positive law. By the custom which generally " prevailed, as has been established in re- " peated instances by the most satisfactory " proof, and been recognized by this Court, two " witnesses were sufficient. Proof of the custom " was given in this case. Similar proof was offered " in *Castro* v. *Castro* (6 Cal., 160), and was held to " obviate the objection to the will in that case, that " one of the three attesting witnesses was incom- " petent. 'That such customs may be proved,' " says the Court, 'and that, when proved, they " ' have the force of law, has been fully settled by " ' the decision of this Court in the case of *Von* " ' *Schmidt* v. *Huntington* (1 Cal. Rep., 56), in " ' which it was held that, under the Mexican law, " ' custom is sometimes allowed to control, limit " ' and modify the general rules of the system, " ' and even to establish a rule in direct contra- " ' vention of positive law, and to obtain the force " ' of law, as well where there is no law, as to over- " ' turn the previous law, which stands in opposi- " ' tion to it.' The force of the custom was recog- " ' nized in *Panaud* v. *Jones* (1 Cal., 488), in which " ' case the Court, by Bennett, *J.*, says: 'The cus- " ' tom with regard to the execution of wills, so far " ' as the testimony goes, appears to have prevailed " ' generally, and for a long time, in California. It " ' may have been the universal practice, from the " ' first settlement of the country, and I do not " ' feel called upon to overturn all titles in this " ' State which may depend on similar wills, be- " ' cause the edicts of Justinian or the laws of Toro

" ' had not been known and strictly followed by
" ' the simple and uneducated Californians.' "

The effect of such customs upon the written law is also recognized by this Court in the case of *Adams* v. *Norris* (23 How., U. S., 353, pp. 364, 365). Although the findings of fact embraced in the transcript of the record returned to this Court upon the present appeal, do not find the existence of this custom in the Territory of New Mexico, the fact that proof on the subject was offered and that the Supreme Court of the Territory of New Mexico regarded the facts respecting the custom as proved, is manifest from the record itself.

The appellant seeks to reverse the judgment below and assigns certain errors on account of which he claims such reversal. The second error alleged is the holding of the will of José Francisco Ortiz, introduced in evidence to be a legal and valid will, legally and properly executed. In order to raise that question it was incumbent on him in obtaining the findings and securing the return of the transcript, which embraces only so much of the original record as the appellant deemed necessary for the proper review of his cause in this Court, to see that the facts, or the evidence in support of the facts, upon which the conclusions of the Court were based, were included in that transcript.

By reference to the exceptions filed by the appellee to the findings of fact and conclusions of law in the report of the Special Master in this cause in the District Court (p. 156), the Court will see that the present appellee expressly excepted to this report.

First, because said Special Master failed to find, as matter of fact, that there was not at the time of the execution of the will of José Francisco Ortiz in 1841, and at the time of his death in 1848, and at no time prior thereto had there been in the Territory of New Mexico an officer known and described as a notary public or scribe.

Second, because the Master failed to find that in the absence of such a notary a custom existed in the Terri-

tory of New Mexico in 1848, and had existed there for more than ten years prior thereto, for open or nuncupative wills to be executed before a Judge of the First Instance, and two witnesses; that this was a general custom of the country at this time and so universal as to become law.

Third, because said Master did not find that the instrument offered in evidence as the mutual will of José Francisco Ortiz and his wife was their last will and testament, made and executed by them according to the custom and in the manner in which such instruments were executed.

The Record shows that the cause came on to be heard upon these exceptions in the District Court, and that thereupon the Court ordered and decreed that the respondents' exception to the question of the validity of the will be sustained and the Master's findings thereon be overruled (p. 160).

This judgment of the District Court was taken to the Supreme Court of the Territory by writ of error, and the fourth error there assigned by the present appellant (p. 162) was in part in sustaining the exceptions of the defendants in error to so much of the report of the special Master in Chancery in said cause as held that said will was invalid, &c.

Again, referring to the judgment of the Supreme Court of the Territory from which the present appeal is taken (p. 163), it will be observed that the Court in their decision affirm the decree of the Court below "for the reasons stated in the opinion now filed," thus making the opinion a part of the judgment.

Referring now to this opinion (p. 188), the Court say:

> "Testimony was also introduced tending to show
> "that there never had been such an officer as an
> "*escribano* or notary within this Territory, as ap-
> "peared from the records of the Surveyor General's
> "office, and that such office was the repository of
> "the ancient Mexican archives and of wills, deeds
> "and other written documents affecting real estate;
> "that the custodian of such office had thoroughly
> "examined all the wills upon file, some of which

"went back for a period exceeding one hundred "years, and that more than ninety per cent. of "them had been executed before an Alcalde and "two witnesses."

Again, at page 191, the Court say:

"Besides, there is abundant evidence showing "that the Republic of Mexico never furnished the "department of New Mexico with such an officer "as an *escribano publico*, before whom wills could "be executed according to the provisions of law; "that in such emergency, the people of this distant "dependency *ex necessitate rei* had been accus- "tomed to execute such instruments in presence of "an Alcalde or Judge of the first instance before two "attesting witnesses; that such custom had been "general, continuous, accepted and recognized as "having the force of law for at least a hundred "years before the date of the will in question. The "expert, Diego Archuleta, a Mexican lawyer and "former member of the Mexican Congress, swears "positively to the existence of this custom. An "examination of the archives, deeds, wills, &c., in "custody of the proper depository in Santa Fé, "corroborates the testimony of the expert on this "point. Such being the custom, a will executed in "accordance therewith is valid."

The quotations above made from the opinion show in part the reasons or grounds of the decision embraced in the judgment from which the present appeal has been taken.

While it is true that an opinion cannot ordinarily be referred to for the purpose of showing the ground upon which a judgment is based, nevertheless an opinion when filed and referred to in the decree for the reasons or grounds of decision becomes a part of it and may be referred to for the grounds of decision. This rule has been laid down in many adjudicated cases.

Legrand v. *Rexey's Administrators*, 83 Va., 862, at 877, referred to in *Last Chance Mining Co.* v. *Tyler Mining Co.*, 157 U. S., 683 (at p. 690).

Tolman v. *Syracuse, Binghampton & N. Y. R. R. Co.*, 92 N. Y., 353 (at p. 356).

Snyder v. *Snyder*, 96 N. Y., 92.

Re Assignment of Holbrook, 99 N. Y., 543.

In the case at bar as has been already pointed out, the Supreme Court of the Territory of New Mexico, in their judgment, expressly referred to the opinion filed by them with the judgment for the reasons of their decision. The opinion is thus made by the decree itself a part of the decision and a part of the record in the case.

3. Irrespective of the question as to how far the Court would examine the opinion for the reasons of the judgment which in terms makes the opinion part of the decision, this Court itself will take judicial notice of the Mexican law at the time of the execution of the will in question as modified by the custom.

Where countries have been acquired by the United States, its courts take judicial notice of the laws which prevailed there up to the time of such acquisition; such laws are not foreign but those of an antecedent government.

U. S. v. *Perot*, 98 U. S., p. 428.
Freemont v. *U. S.*, 17 How., 542 (at p. 557).
U. S. v. *Turner*, 11 How., 663 (at p. 668).

Again, by the Act of Congress of July 22, 1854 (Chap. CIII., of the Laws of 33d Congress, First Session; 10th U. S. Stat. at Large, p. 308), being an act to establish the office of Surveyor-General of New Mexico, &c., express provision is made for giving effect to the laws, usages and customs of Spain and Mexico in ascertaining the origin, nature, character and extent of claims to lands. By the 8th section it is provided that he shall make a full report on all such claims as originated before the cession of the Territory to the United States, by the treaty of Gaudalupe Hidalgo of 1848, denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the *laws, usages, and customs* of the country before its cession to the United States.

4. Again, the sufficiency of the execution of the will in question is not dependent upon a strict compliance with

the laws and customs in force governing the execution of wills by civilians.

It has been expressly found that at the time of the execution of the will in question, José Francisco Ortiz was in the military service of the Republic of Mexico, holding the rank of lieutenant, acting as captain, and that he continued in such service until the occupation of Santa Fé by the Government forces of the United States. The Spanish and Mexican law relaxed the ordinary requisites for the due execution of a will in the case of one employed in the military service of the country.

Velarde, in his treatise "Practica de Testamentos," cited above (at p. 6), states the law as affecting persons in military service as follows:

> "Besides the will for religious causes in which, as "has been said, some formalities are dispensed "with, there is another which is entirely free from "them, requiring only for its validity, that the will "of the testator clearly appears. Such is the mili- "tary will or the will of soldiers. They, by the "laws of the Partidas, on finding themselves "in the field, can make their will before two "witnesses; but, if they are in danger of "death by reason of any event of war, "they can make it in such manner as they are able, "in writing or by word, by writing it with their "blood on their shields or on their arms, or on "whatever place presents itself, provided it can be "proved by two witnesses present. Moreover, "by the ordinances of the army, printed for the "first time in the year 1768, and reprinted recently "in this city, it was declared that every individual "who enjoys military law, enjoys it as well in re- "spect to wills in any place that he makes a will, "whether or not in the field; that in the conflict of "a battle or about to enter into it, in shipwreck, or "in any other military risk, he can make a will in "such manner as he desires or is able, in writing "without witnesses, provided it clearly appears to "be in his own hand, or by word before two wit- "nesses, who confirming one another depose that "he declared to them his will; that the disposi- "tion of the military man is valid written on any "paper and whether in garrison, quarters or

"march; and that he can always make a will before "a notary, doing it according to the general custom.

"Any doubts which this article presents are "removed by an order in which it is declared "in general terms, that every individual enjoy- "ing the law of war, can, by force of his privi- "lege, execute by himself his will on paper, by "signing with his hand or by any other mode in "which his will clearly appears, or can make it "before a notary with the formulas and conditions "of custom. By virtue of this order, not only sol- "diers, but also all who enjoy military law can "make a will without the formalities prescribed by "ordinary law. So that in the opinion of some, "the two witnesses which are required by the ordi- "nance are not necessary, in view of there being no "mention of any formality; although others are of "the opinion that they are necessary because the "article of the ordinance is not expressly repealed "in the order."

This relaxation in favor of the military man of the ordinary formalities requisite to the due execution of a will was expressly recognized by this Court in *Adams* v. *Norris*, 23 How., 353 (at p. 365).

Whether the execution of the will in question, therefore, be tested by the original Spanish law, or by the said law as modified by the custom, or by the military law, it is respectfully submitted no error was made by the Supreme Court of the Territory of New Mexico in holding that the will of José Francisco Ortiz was a valid and legal will, and conveyed the interest of José Francisco Ortiz to the premises in question, to his widow, Maraquita Montoya, from whom the title was conveyed by mesne conveyance to the present appellee.

5. The point is made in the third assignment of errors that the Territorial Supreme Court erred in holding that the will was sufficient to vest the title to the property in controversy in the widow of Ortiz without having been proved, established or admitted to probate.

The will in question, however, was not of the class which under the Spanish or civil law required probate.

There were two classes of open or nuncupative wills known to the law.

The first, to which the will in question belonged, embraced open or nuncupative wills made before an *escribano*, or, in the absence of such officer, before a judge whose acts imparted verity. Wills of this class never required any subsequent probate. They are sometimes designated as "public" writings.

The second class embraced open or nuncupative wills executed in private before unofficial persons without the presence of any judicial officer. For wills of this class provision was made by law for subsequent proof. These were distinguished by the designation of "private" writings.

This distinction was expressly recognized in the law as laid down by Velarde in his "Practica de Testamentos."

Chapter 15 of this book (p. 53) is entitled, "Of the opening of the sealed testament and the proving of the nuncupative will *not* made before a notary."

His work contains no provision for the proof or publication of an open or nuncupative will made before a notary or other judicial officer.

Gustavus Schmidt, in his work on the "Laws of Spain and Mexico," makes the same distinction.

In article 1015 (pp. 214, 215) he states the requirements of the law for the probate of an open will made before witnesses *without* a notary.

There is no provision for the subsequent proof of an open will made before a notary or other judicial officer. The proof and publication of such wills were deemed complete by the public declaration made by the testator before the notary or other judicial officer at the time of the execution of the instrument and no subsequent proof was necessary.

This subject is carefully considered and this distinction recognized by the Supreme Court of New Mexico in *Bent* v. *Thompson* (23 Pac. Rep., 234, at p. 236).

The will in question, therefore, took effect on the death of the testator, without further proof. It was so held under like conditions in the case of *Grimes' Estate* v. *Norris*, 6 Cal., 624, affirmed under the title of *Adams* v. *Norris*, in this Court (23 How., 353, at p. 362, 363).

Under the Mexican law as enforced in California such a proceeding as the probate of an open will executed in the presence of a notary was unknown. The will took effect as a conveyance upon the death of the testator (*Tevis* v. *Pitcher*, 10 Cal., 477).

The will in question in the case at bar, it will be remembered belongs to the class of open or nuncupative wills declared and executed in the presence of a judicial officer, and was declared and executed at the City of Santa Fé, capital of the Department of New Mexico, in the presence of Albino Chacon, constitutional Alcalde and by operation of law Judge of First Instance and two attesting witnesses, acting with him and was authenticated by him with his attending witnesses according to law (Will, p. 186, Finding VII., p. 172).

It had been made openly and published by the testator during his lifetime and no subsequent publication after his death was necessary.

This question was the subject of investigation in the case of *Panaud* v. *Jones*, where Bennett, *J.*, delivering the opinion of the Court, speaks as follows:

> "It would seem that the observance of these "formalities with respect to an open or nuncupa- "tive will, would be useless ceremony. The will "had been made openly and published by the testator "during his lifetime, and there need be no further "publication after his death. If it were made before "an escribano, or, in defect of one, before a Judge "whose acts impart absolute verity, it is already "probated; and in the Californias Alcaldes have all "the powers and jurisdiction of Judges of first in- "stance (*Decree of March* 2, 1843, 2 *Vol. of Decrees* "*of Provisional Government; Mena* v. *Le Roy*, "*ante*, *p.* 216). The will of Alviso was made before "an Alcalde. But even though it were not made "before any officer, yet being reduced to writing, "and attested by the requisite number of witnesses, "it might have been proved at any time, and the "omission to reduce it to the form of a public "writing would not affect its validity; for this "may be done and the will be registered for the "security of all persons, upon the petition of any "party interested."
>
> 1 *Cal.*, 488, *at p.* 508.

In the Department of New Mexico, also, the Alcaldes had all the powers and jurisdiction of Judges of First Instance.

Mena v. *LeRoy*, 1 Cal., 216.

That the officer before whom the will in question was made and executed had, by operation of law, all the powers of a Judge of the First Instance is expressly found in the case at bar.

Finding XXIV., subdv. 8, p. 183.

Bent v. Thompson (23 Pac. Rep., 234), relied on below by the appellant has no application to the case at bar. The question there was as to the right of the probate Court to annul a former judgment of the same Court admitting a will to probate and to reprobate the same.

The will was not executed under the Mexican law, but was made in 1865 under the territorial law.

The Spanish law referred to in *Meegan* v. *Boyle* (19 Howard, 130, at p. 149), as requiring wills to be proved by the attesting witnesses within a month after the death of the testator had no application to open nuncupative wills, executed in the presence of a notary or other judicial officer, whose acts imparted verity. Its application was limited to sealed wills, or at most to *private* nuncupative wills, not executed in the presence of a notary or other judicial officer.

II.

The appellant's suit was properly dismissed below as barred by the Statute of Limitations of the Territory of New Mexico.

This Statute of Limitations appears as Section 1880 in the compiled laws of New Mexico of 1884, and is in substantially the same language as the Act of 1858, Chap. 17, p. 64.

This section provides that where any person shall be in possession for ten years of any land granted by the Gov-

ernments of Spain or Mexico, "holding or claiming the "same by virtue of a deed or deeds of conveyance, de- "vise, grant or other assurance purporting to convey an "estate in fee simple, and no claim by suit in law or "equity, effectually prosecuted, shall have been set up "or made to the said lands, tenements or hereditaments "within the aforesaid time of ten years, then and in that "case the person or persons, their children, heirs or "assigns so holding possession as aforesaid shall be en- "titled to keep and hold in possession such quantity of "lands as shall be specified and described in his, her or "their deed of conveyance, devise, grant or other assur- "ance as aforesaid in preference to all and against all "and all manner of person or persons whatsoever and "any person or persons, their children or their heirs or "assigns who shall neglect or who have neglected for the "said term of ten years to avail themselves of the benefit "of any title, legal or equitable, which he, she or they "may have to any lands, tenements or hereditaments "within this Territory, by suit of law or equity effectually "prosecuted against the person or persons so as aforesaid "in possession, shall be forever barred, and the person or "persons, their children, heirs or assigns so holding or "keeping possession as aforesaid by the term of ten years "shall have a good and indefeasible title in fee simple to "such lands, tenements or hereditaments."

In order to understand the application of the statute cited to the case at bar, the attention of the Court is recalled to the facts as to the title and possession of the property in question. The original grant by the Mexican Government, it has been seen, was made to José Francisco Ortiz and Ignacio Cano, and the grantees put in formal and actual possession in December, 1833. The documents relating to this original grant appear in the Record (pp. 147–152).

The facts are found in Finding I.

The Court below have also found with respect to the possession of the premises in question as follows:

"XVI.—That the said José Francisco Ortiz held "possession of the property as described in the

" original writ of possession from the date of the " grant to him and Ignacio Cano up to the time of " his death, to wit, on the 22d day of July, 1848.

" That after his death, his surviving widow, " Maraquita Montoya, took and held possession " from that time up to the 20th day of December, " 1853, when she sold, transferred and delivered " the possession of the property in the deed of " conveyance to John Greiner.

" That the said John Greiner took possession of " the property, as described in said deed of convey- " ance, on the 26th day of December, 1853, and " that he and all his assigns held actual, open " and notorious possession of said property from " that day until the date of filing complainant's " cross-bill in this suit.

" That such possession was held by employing an " agent or agents to live on the property at the " village of Dolores, near the said 'Santa Rosalia " mine,' and by making large and extensive im- " provements on the property, in building a large " stamp mill at Dolores, and many other acts, open " and notorious, indicative of ownership of the " property. But the evidence does not show that " the respondents or their grantors were in actual " physical possession from January 28th, to and in- " cluding July 11, 1884.

" That such claim of ownership and possession " was made by the respondents, The New Mexico " Mining Company, Stephen B. Elkins and Jerome " B. Chaffee, and all their grantors, under and by " virtue of the grant made by the Mexican govern- " ment to José Francisco Ortiz and Ignacio Cano, on " the 10th day of December, 1833, and through " divers mesne conveyances, to the time of the " filing the cross-bill in this suit."

See also Finding XI., p. 174.

On the other hand it has been distinctly found by the Court below that at no time were the collateral heirs of the said José Francisco Ortiz, under whom the appellant claims, or any of their descendants or grantees, in possession, active or constructive, of said property. On this subject the finding of the Court was as follows (Finding XXII., p. 182):

" That the heirs of José Ignacio Ortiz and Marie " de la Luz Ortiz de Sanchez, brother and sister of

"José Francisco Ortiz, were not in possession, "either active or constructive, at the time they "made deeds of conveyance of their alleged interest "in the Ortiz Mine grant, claiming to be collateral "heirs of José Francisco Ortiz, and that said "alleged collateral heirs, not their direct ascendants "ever were at any time in possession of said prop- "erty, either active or constructive. That said "Brevoort had notice of the fact that none of his "grantors were in possession. That the respond- "ents, the New Mexico Mining Company, were "then in actual possession of a part of the grant, "claiming title to all of it That at the time the "deed was made from Brevoort to Gildersleeve "and Knaebel, the respondents, the New Mexico "Mining Company, were in possession, either ac- "tual or constructive. That it appears from the "evidence that Gildersleeve and Knaebel had no- "tice of the fact that Brevoort was not in pos- "session, and that respondents were in possess- "sion. That it appears also from the deed of con- "veyance and from the evidence of the complain- "ant that the deed of conveyance for one undi- "vided moiety or half part of said grant was "given in consideration of money advanced from "the complainant to said Brevoort for the main- "tenance of the suit, and for legal services of "said Gildersleeve and Knaebel in filing the bill in "chancery, and investigating the title, and prose- "cuting it to a final conclusion."

It will be observed by reference to the original grant and to the description in the deeds that this Ortiz Mine grant was not what has been designated in some of the cases as a "float." It was not a designated number of acres of land to be located anywhere within the limit of a larger tract of the public domain, the exterior boundaries of which larger tract alone were given.

In finding XI. (p. 174) is set out the description from the deed of Maraquita Montoya to John Greiner, which description is as follows:

"Give, grant, bargain and sell and convey unto "the said John Greiner, his heirs and assigns, a "certain parcel of land, on which a gold mine, "known by the name of Santa Rosalia, is situated, "in the Real de Dolores in the County of Santa

"Fé aforesaid, the vein of said mine traversing "from north to south of the mountain called the "'Oso,' and bounded and described as follows, to "wit: Measuring from east to west under the said "vein fifteen varas, measuring south from the "mouth of the mine eighty varas to the southern "boundary of the mine, formerly known by the "name of 'Santo Naño,' and now owned by said "Greiner and others, measuring five hundred and "twenty varas; also a certain house situated near "the said mine, now occupied by Juan Ortiz, as "tenant at will; also the Oso spring, situated near "said house, with all the privileges of the water "for watering place and use of machinery in the "working of said mine, and also rights of commons and pasture for the distance of two leagues, "measuring from the mine to all the cardinal "points of the compass, being the same right to "the interest and privileges conveyed according to "the mining laws of the Republic of Mexico by "Francisco Baca y Ortiz, first alcalde of the district of Santa Fé, to José Francisco Ortiz and "Ignacio Cano, under date of the 19th day of "December, 1833."

The grant and early conveyances precisely locate the property granted. The central point was the opening of the "Santa Rosalia" mine and the limits of the grant of commons and pasture were for the distance of two leagues measuring from the mine to all the cardinal points of the compass.

The method of laying out and the boundaries of a grant of this description under the Mexican law and customs were perfectly well understood.

The appellant himself in his amended cross-bill (p. 98) shows perfect familiarity with this law, and the way in which the lines must be run.

The surveyor himself could have no other guide in making his map.

It will be kept in mind that this was not a grant of a designated number of acres out of a large tract, but a designated tract the lines of which were prescribed, the starting point being the opening of a mine, the location of which is given and which was a notorious natural object.

Application having been made by the grantees under the deed of John Greiner, then in possession claiming title, to the Surveyor General of the Territory, to examine their title to the grant, lands and premises in question and approve the same and recommend their final confirmation to the Congress of the United States, the said Surveyor-General, A. P. Wilbar, having made such examination did, on November 24, 1860, render a decision approving the title of the petitioners and recommending its final confirmation.

Decision of Surveyor-General, pp. 136, 137, Finding XIII., p. 176.

In conformity with such recommendation, the United States, by Act of Congress, approved March 1, 1861, confirmed the title of the petitioners to the grant and lands in question under the designation of Private Land Claim in the Territory of New Mexico, No. 43.

Chap. LXVI., 36th Congress, 2d Session.

The survey of the Ortiz Mine grant, the title to which had been so confirmed, was completed August 14, 1861, by Thomas Means, a United States Deputy Surveyor, by the authority and under the direction of the Surveyor-General of the United States for the Territory of New Mexico.

See further report of Surveyor-General, of September 25, 1861, returning bounds and description from official survey, set out in Patent, at page 18.

From this it would appear that from the date of this survey at least no question existed, if there had ever been any, as to extent and boundaries of the premises claimed by the grantees of John Greiner and wife in fee under their deed. It was more than eleven years after the act of confirmation had been passed and official survey had been filed, to wit, in May, 1873, that Elias Brevoort, under whom appellant claims, set about buying up possible interests of collateral heirs of José Francisco Ortiz, for

the purpose of assailing in equity the title of the parties in possession.

1. By Article VIII. of the Treaty of Guadalupe Hidalgo, the property of Mexicans, within the territory ceded by Mexico to the United States was to be inviolably respected, and they and their heirs and grantees were to enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States.

9th Stats., pp. 929, 930.

The duty of providing the mode of securing those rights, and of fulfilling the obligations imposed upon the United States by treaty, belonged to the political department of the Government, and Congress might either itself discharge that duty or delegate it to the judicial department.

Prior to the Act of March 3, 1891, Chap. 539, 26th Stat., p. 854, Congress had not established a judicial tribunal for the adjustment and confirmation of claims and of grants from the Mexican Government of land in New Mexico. It has reserved to itself the determination of such claims.

By an act passed July 22d, 1854 (Chap. 103, Sec. 8, 10th Stat., p. 309) it was made the duty of the Surveyor-General for New Mexico under such instructions as might be given by the Secretary of the Interior to ascertain the origin, nature, character and extent of all claims to lands under the laws, usages and customs of Spain and Mexico. He was required to make a full report on all such claims as originated before the cession of the territory to the United States by the treaty of Guadalupe Hidalgo, denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages and customs of the country before its cession to the United States. This report was to be laid before Congress for such action thereon as might be deemed just and proper, with a view to confirm *bona fide* grants and give full effect to the treaty of 1848 between the United States and Mexico.

It has been shown that this course was pursued in the case of the Ortiz Mine grant, and that the report of the

Surveyor-General approving the title of the petitioners and recommending the confirmation of the grant was made under date of November 24, 1860, and that this recommendation was adopted by Congress and the title confirmed by the Act of March 1, 1861.

In *Tameling* v. *U. S. Freehold, &c., Company* (93 U. S., 644), Mr. Justice Davis, in delivering the opinion of the Court, says (p. 661):

> " We have repeatedly held that individual rights
> " of property in the territory acquired by the United
> " States from Mexico were not affected by the
> " change of sovereignty and jurisdiction. They
> " were entitled to protection, whether the party had
> " the full and absolute ownership of the land, or
> " merely an equitable interest therein, which re-
> " quired some further act of the Government to vest
> " in him a perfect title."

The Court then referred to the different legislation of Congress with reference to the ascertainment of titles to lands in California and in New Mexico, and pointed out that under the statute above cited (10 Stats., p. 308), the Surveyor-General, in the exercise of the authority with which he was invested, decided such claims in the first instance, and then the Court adds (p. 662):

> " The final action on each claim reserved to Con-
> " gress is, of course, conclusive, and therefore not
> " subject to review in this or in any other forum."

See also *Astiazaran* v. *Santa Rita Land and Mining Co.*, 148 U. S., p. 80.

When, therefore, the title of the appellee's grantors to the lands and premises in question had been ratified and confirmed by the act of Congress confirming the same, and the boundaries had been determined by the official survey, no question remained as to the extent and rights of the parties in possession under whom the appellee claimed so far as the United States had any interest in that question. The limits and boundaries of the grant of which they and their grantors had been in undisturbed possession

since 1833, and which they claimed in fee under the deed from Greiner, were finally *settled* and made certain, if any uncertainty on that subject had existed.

2. It is claimed on the part of the appellant, however, that inasmuch as a patent was subsequently issued for the lands in question, the date of the issue of the patent must be taken as the date from which the Statute of Limitations of the Territory of New Mexico commenced to run.

The patent in question appears in the Record at page 15.

It is respectfully submitted that in this contention the appellant is entirely without legal foundation or support.

It will be kept in mind that the lands in question formed no part of the public domain of the United States; that by the terms of the treaty the rights of the owners existing at the time of the cession of the Territory of New Mexico to the United States were preserved inviolate, and that Congress had already, in 1861, upon the report of the Surveyor-General, made in conformity to the statute, passed upon and approved the existing title to the lands in question and confirmed the same.

In *Langdeau* v. *Hanes* (21 Wall., 521), the opinion of this Court was delivered by Mr. Justice Field, who (at p. 529) says:

> "In the legislation of Congress a patent has a "double operation. It is a conveyance by the "government when the government has any in- "terest to convey, but where it is issued upon the "confirmation of a claim of a previously existing "title it is documentary evidence, having the dig- "nity of a record, of the existence of that title, "or of such equities respecting the claim as justi- "fied its recognition and confirmation. The instru- "ment is not the less efficacious as evidence of "previously existing rights, because it also em- "bodies words of release or transfer from the gov- "ernment."

In *Whitney* v. *Morrow* (112 U. S., 693), the Court referring to a patent which had been offered in evidence, say (p. 695):

> "It could not deprive the confirmee of the land "confirmed to him by the act of Congress if that "was by specific boundaries, distinguishing and "separating it from other parcels, or was capable "of identification. If, by a legislative declaration, "a specific tract is confirmed to any one, his title is "not strengthened by a subsequent patent from "the government. That instrument may be of "great service to him in proving his title, if con-"tested, and the extent of his land, especially when "proof of its boundaries would otherwise rest in "the uncertain recollection of witnesses. It would "thus be an instrument of quiet and security to "him, but it could not add to the validity and com-"pleteness of the title confirmed by the act of Con-"gress."

In *Morrow* v. *Whitney* (95 U. S., 551, at p. 554), this Court had already declared, Mr. Justice Field delivering the opinion, that

> "A confirmation is a conveyance of an estate or "right in lands to one who has the possession or "some estate therein. The tract confirmed appears "to have had clearly defined boundaries, or to have "been at least capable of identification; and, if such "were the case, the confirmation perfected the "claimant's title. A subsequent patent would only "have served as documentary evidence of that "title."

As has been shown above this grant and its boundaries were capable of absolute identification, and so conceded by the appellant in his amended cross-bill (p. 89).

In *Stoddard* v. *Chambers* (2 How., 316), this Court, Mr. Justice McLean delivering the opinion, had already said:

> "A confirmation, by act of Congress, vests in the "confirmee the right of the United States, and a "patent, if issued, could only be evidence of this."

The doctrine laid down in *Langdeau* v. *Hanes* as to the office of a patent where there had been a previous grant or confirmation of title by act of Congress, has been reaffirmed by this Court in many cases. Among the later of these are:

Wisconsin R. R. Co. v. *Price County*, 133 U. S., 496.
Deseret Salt Co. v. *Tarpey*, 142 U. S., 241.
McNee v. *Donahue*, 142 U. S., 587, at pp. 598, 599.
Curtner v. *United States*, 149 U. S., 662.

The validity of the title claimed under the will of José Francisco Ortiz is not involved in the consideration of the question as to the bar of the appellant's suit under the Statute of Limitations.

The facts as to the possession by the appellees and those under whom they claim and the adverse character of that possession were undisputed, and have been expressly found; such adverse possession dating back to the death of José Francisco Ortiz in 1848, commenced by the widow and continued by her grantees claiming title in fee to the premises embraced in the original Mexican grant, the precise metes and bounds of which were fixed by the act of Congress and official survey thereunder in 1861.

In *Probst* v. *Presbyterian Church* (129 U. S., 182), the charge of the trial Court on the subject of the effect of the Statute of Limitations was under review, and the law on that subject was there laid down by the Court, Mr. Justice Miller delivering the opinion, as follows:

> "It is the essence of the Statute of Limitations "that whether the party had a right to the possession or not, if he entered under the claim of such "right and remained in the possession for the "period of ten years, or other period prescribed by "the statute, the right of action of the plaintiff "who had the better right is barred by that adverse "possession. This right given by the Statute of "Limitations does not depend upon, and has no "necessary connection with, the validity of the "claim under which that possession is held. "Otherwise there could be no use for adverse pos-

" session as a defense to an action, for if the decis-
" ion is made to depend upon the validity of the
" respective titles set up by the plaintiff and the
" defendant, there can be no place for the consider-
" ation of the question of possession. It is because
" the plaintiff has the better title that the defend-
" ant is permitted to rely upon such uninterrupted
" possession adverse to the plaintiff's title as the
" statute prescribes, it being well understood, and
" an element in such cases, that the plaintiff does
" have the better title, but though he has it that
" he has lost his right by delay in asserting it.

" Nor is it necessary that the defendant shall have
" a paper title under which he claims possession.
" It is sufficient that he asserts ownership of the
" land, and that this assertion is accompanied by
" an uninterrupted possession. It is this which
" constitutes adverse possession, claiming himself
" to be the owner of the land. This is a claim ad-
" verse to everybody else, and the possession is
" adverse when it is held under this claim of owner-
" ship, whether that ownership depends upon a
" written instrument, inheritance, a deed, or even
" an instrument which may not convey all the
" lands in controversy. If defendant asserts his
" right to own the land in dispute, asserts his right
" to the possession, and his possession is adverse
" and uninterrupted, it constitutes a bar which the
" statute intended to give to the defendant.

" The instructions of the Court are utterly at
" variance with this doctrine. They do away with
" the value of adverse possession as a defense to an
" action of ejectment. They say in effect that un-
" less the defendant was in the right when he took
" possession, the length of its continuance does not
" afford him any ground for a defense; whereas, it
" is obviously the nature and purport of the defense,
" established by the Statute of Limitations, that
" the defendant may not have been in the right,
" but this long actual possession estops the plaintiff
" from putting the defendant to the proof of the
" right.

" The Court not only erred upon this subject in
" the positive instructions which it gave to the
" jury, but also in refusing to charge as follows, at
" the request of the defendant:

" 'That an uninterrupted occupancy of land by
" 'a person who has in fact no title thereto, for the

" 'period of ten years adversely to the true owner,
" 'operates to extinguish the title of the true
" 'owner thereto and vests the right to the premises
" 'absolutely in the occupier.' "

III.

But assuming, for the sake of the argument, that the will of José Francisco Ortiz for some reason was ineffectual to pass title to the grant and that the appellant's cause of action only came into being on the issue of the patent on May 20, 1876, still the judgment appealed from should be affirmed on the ground of appellant's laches.

The suit in which the judgment was entered was a bill in Chancery seeking to impress the patent and lands described therein with a trust in favor of the complainant, and to hold the respondents as trustees *ex maleficio* for the complainant, on the ground of alleged fraud and misrepresentation in the proceedings leading up to and ending in the issue of the patent in their favor.

The bill is entirely silent upon the point as to when or how or under what circumstances the facts constituting the alleged fraud were discovered by the complainant. Under the well-settled rules of this Court this omission would be fatal to the appellant's case.

Badger vs. *Badger*, 2 Wall., 87, 94.
Felix vs. *Patrick*, 145 U. S., 331–332.
Hardt vs. *Heidweyer*, 152 U. S., 547, 558–559.

The appellant and his coadjutor, Elias Brevoort, to whose rights he claims to have succeeded, were residents of Santa Fé, in the immediate vicinity of the property in controversy, where all the proceedings before the Surveyor-General were had and where the records were kept.

As early as 1873 Brevoort had set about purchasing the possible rights of the collateral heirs of José Francisco Ortiz in the lands in controversy, and some time before June 30, 1880 (how long is not disclosed), had entered into an arrangement with the appellant to join him in a raid to be made on the owners in possession, the appellant having prior to that date, necessarily with knowledge of all the facts, prepared a bill and entered into an arrangement with Brevoort to prosecute his suit to an end, and to advance the disbursements necessary for that purpose, in consideration of an assignment to him and his partner of a half interest in said Brevoort's possible rights (p. 83).

In January, 1880, the Legislature of New Mexico had passed an act (Chap. 5, Laws of 1880) limiting the time within which suits might thereafter be brought. The provisions of this act are incorporated in the Compiled Laws of New Mexico of 1884, commencing with Section 1860. The sections bearing upon the point under consideration are the following:

"§ 1860. The following suits or actions may be brought "within the time hereinafter limited, respectively, after "their causes accrue, and not afterwards, except when "otherwise specially provided.

"§ 1863. Those founded upon accounts and unwritten "contracts, those brought for injuries to property or for "the conversion of personal property, or for relief upon "the ground of fraud, and all other actions not herein "otherwise provided for and specified, within four years.

"§ 1865. In actions for relief on the ground of fraud or "mistake, and in actions for injuries to or conver-"sion of property, the cause of action shall not be "deemed to have accrued until the fraud, mistake, injury "or conversion complained of shall have been discovered "by the party aggrieved.

"§ 1877. None of the provisions of this act shall run "against causes of action originating in or arising out of "trusts, when the defendant has fraudulently concealed

" the cause of action, or the existence thereof from the " party entitled or having the right thereto."

Under the provisions of this law, the appellant and those under whom he claimed then having knowledge of the facts constituting the alleged fraud, under any possible view of the situation, should have commenced their suit within four years from the passage of the act cited.

In point of fact, it was only on January 27, 1886, that Brevoort obtained an order upon a stipulation, which was the subject of a controversy, authorizing him to file a cross-bill to the bill of complaint in the Farish suit and providing that the order be entered *nunc pro tunc* as of July 11, 1884.

Order, p. 41.

And Brevoort's cross-bill appears to have been filed only pursuant to said order of January 27, 1886, *nunc pro tunc*, as of July 11, 1884.

The appellant's amended cross-bill was only filed December 22, 1886 (p. 95). It was to relate back to the filing of Brevoort's cross-bill, which was filed January 27, 1886, *nunc pro tunc*, as of July 11, 1884 (p. 41).

This was more than four years after the date of the agreement between Brevoort and the appellant, to wit, June 30, 1880. At the date last mentioned, the appellant had already prepared a bill on behalf of Brevoort for the same object.

No error was, therefore, committed by the Court below in dismissing the appellant's cross-bill, and the judgment appealed from should be affirmed.

JOS. LAROCQUE,
Of Counsel for Appellee.